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PRACTICE

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Law

PROCEEDINGS

SUPPLEMENTARY TO EXECUTION

WITH

TABLE OF CASES AND FORMS

BY
WILLIAM
GEO. W. BRADNER

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PREFACE.

When a new work is offered to the public, and especially when there are existing works upon the subject, it is expected that the author will state the reason which induced the publication. Radical differences exist between this work and its predecessors. The rules of exclusion of overruled and obsolete decisions and cumulative citations in law-book making are hardly less important than those of inclusion, and on this point the practitioner will find this work of value. The decisions of the courts during the years 1889-1894, inclusive, have worked great innovations in the practice in proceedings supplementary to execution. The legislature has interfered for the putting an end to some disputed questions. Thus, in 1894, sections 376, 382 and 3017 of the Code of Civil Procedure were amended in respect to judgments of courts of inferior jurisdiction, where a transcript is filed with a clerk of a court of record. Law books on the practice in proceedings supplementary to execution owe their bulk in a great part to the practice in contempt proceedings, which is a separate and distinct proceeding. But this is necessary, from the fact that all orders in supplementary proceedings have to be enforced by contempt proceedings. Practice in supplementary proceedings points out in what manner the various steps are to be taken to obtain orders, and practice in contempt proceedings how those orders are to be enforced. In attempting to give an outline of the practice in proceedings supplementary to execution, we start with the fundamental principle that statutory proceedings must be strictly pursued, and that any material variance from the letter of the statute is fatal. Mere number of citations of cases is not the only nor the chief test of value in a law book, and the author has in this work carefully ruled out those that are clearly obsolete. There is much of the old practice which has become obsolete, and it is, consequently, omitted.

No attempt has been made to state the old practice. Of course, there are, and there will continue to be, disputed and doubtful questions under these proceedings for decision by the courts; and to avoid all error, and to prevent any omission of valuable citations, is not the lot of any author.

In order to add to the utility of this work, we have used the familiar, but always serviceable, device of placing a table of contents at the head of each chapter, and subdividing the context and giving the text at the head of each subdivision.

The plan followed in this work has prevented the introduction of long critical dissertations on controverted points. A continuous system of citations gives the reader the means of verifying by their sources all the propositions of the text. In these citations I have strictly confined myself to the leading cases, I mean to the latest cases in the courts of last resort. I believe that I have neglected, among modern authorities, no source of information. Thanks to the thorough scrutiny by the courts of which the questions of practice in proceedings supplementary to execution have been subjected for the ten years last past, a problem that would formerly have been deemed impossible has reached a solution which leaves room for much uncertainty, but which is amply sufficient for the demands of the practitioner. All we propose to do is to collate the work of the legislature and that of the courts and judges, and put it into a concise form for the use of the profession. This includes proceedings for the appointment of receivers, and appeals from orders in the different proceedings.

GEO. W. BRADNER.

August 18, 1894.

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PRACTICE

IN

SUPPLEMENTARY PROCEEDINGS.

CHAPTER I.

- | | |
|--|---|
| <p>I. OF PROCEEDINGS SUPPLEMENTARY TO EXECUTION.</p> <ol style="list-style-type: none"> 1. Nature and object of. 2. A special proceeding. 3. Lien where no receiver is appointed. 4. Where no lien attaches. <p>II. WHAT STATUTORY RIGHTS CAN NOT BE ENFORCED BY.</p> <ol style="list-style-type: none"> 5. In general. | <ol style="list-style-type: none"> 6. Surplus premium in life insurance. 7. Surplus income of trust funds. 8. Lands conveyed to another—Consideration. 9. Judgment against corporation. 10. Foreign ministers — Consuls., etc. <p>III. CONCURRENT REMEDIES.</p> <p>IV. TAX—PROCEEDINGS TO COLLECT.</p> |
|--|---|

I. OF PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

1. Nature and object of.—Proceedings supplementary to execution, under the Code of Civil Procedure, §§ 2432–2471, inclusive, furnish for most purposes a simple substitute for the old equity proceedings, in discovering and applying the property of a debtor, which cannot otherwise be reached for the payment of his debts.

It is provided by sections 1871 and 1872 of the Code of Civil Procedure, that where an execution against the property of a judgment-debtor issued out of a court of record, to the county where the judgment-debtor resides, if he is a resident of the state, or if he is not a resident of the state, to the sheriff of the county where he has an office for the regular transaction of business in person; or if he has no such office within the state, to the sheriff of the county where the judgment-roll is filed, has been returned wholly or partly unsatisfied, the judgment-creditor may maintain an action, etc. These sections are nearly the same as sections 2435 and 2438 in regard to supplementary proceed-

ings. A discovery may be compelled under section 1878, the same as under sections 2435, 2436, 2437, 2441. An injunction order issues under section 1876, the same as under section 2451. Section 1879 exempts the same property as section 2463. By section 2469, it is provided that where an order for the debtor's examination has been served, the receiver's title, when vested pursuant to section 2468, extends back so as to include the personal property of the judgment-debtor at the time of the service of the order, except as against *bona fide* purchasers, or against creditors who have meanwhile received payment from their debtor in good faith and without notice. The words "personal property" in this section include money, chattels, things in action and evidence of debt—section 3342.

Section 2469 is a new provision, not found in the former Code, and appears to have been inserted to change the rule declared in *Bécker v. Torrance*, 31 N. Y. 631, to the effect that a lien was acquired by the creditor on the property of his debtor by the commencement of supplementary proceedings, and that when a receiver is appointed his title relates to the date of his appointment, and is subject to any lien on the debtor's property acquired by third persons intermediate the commencement of the proceedings and the appointment of the receiver. In *McCorkle v. Herrman*, 117 N. Y. 297; 27 N. Y. St. Rep. 336, the real question related to priority of lien as between a judgment-creditor of a contractor, who had duly commenced supplementary proceedings on his judgment terminating in the appointment of a receiver, and laborers and material men who subsequent to the supplementary proceedings, and within the time allowed by law, filed notices of lien to reach the debt owing the contractor, under a contract with the owner of the building for its construction. In that case the court say: "The creditor, whom the plaintiff represents by the commencement of supplementary proceedings, acquired under section 2469 of the Code an equitable lien on the debt then owing by the defendant, which on the appointment of the receiver became a legal title in the receiver to the claim of the contractor against the defendant as of the date of the service of the order in the supplementary proceedings. Subsequent to the service of the order the liens were filed.

Which of the claimants have the prior right? We think the plaintiff, as receiver, has the superior claim. He stands as the assignee of the claim of the contractor against the defendant by a title which antedates the filing of the notices of lien. If the proceedings instituted by the creditor, whom the plaintiff represents, has been abandoned, the liens would have had priority, but not having been abandoned and the equitable liens existing when the liens were filed having been converted into a legal title as of a time anterior to the filing of the liens, the right to the debt as between the plaintiff and the lienors vested in the former. The plaintiff, we think, stands in as good a position at least, as if, prior to the filing of the liens, the contractor had in good faith assigned his claim against the defendant to the creditor in the supplementary proceedings as security for his debt. The assignee under such an assignment would take precedence over lienors under liens subsequently filed. *Craig v. Smith*, 37 N. J. L. 549; *Dorestan v. Krieg*, 66 Wis. 604. Our decision relates to a case of money due or earned at the time those proceedings were instituted."

2. A special proceeding.—Section 2433 of the Code of Civil Procedure prescribes that each of the remedies provided for by section 2432 is a special proceeding. The Code of Civil Procedure divides all remedies into "actions" and "special proceedings." It defines an action to be "an ordinary proceeding in a court of justice by which a party prosecutes another," etc.; and then declares that "every other remedy is a special proceeding." The distinction between an action and a special proceeding is held to be, that a proceeding instituted by summons and complaint is an action, and that every other remedy is a special proceeding. *Belknap v. Waters*, 11 N. Y. 477. An action is commenced by the service of summons in some one of the modes prescribed by law, and no proceeding can be an action unless it be such that it can be commenced by the service of summons on the opposite party; and pleadings—that is, an allegation of the cause of action on the one side, and of the defense on the other. Section 2432 of the Code provides for three distinct remedies and modes of proceedings to reach the property of a judgment-debtor, and to prevent any dis-

position thereof in fraud of the rights of the judgment-creditor.

The first is by a proceeding against the judgment-debtor after the return of an execution unsatisfied; the second is by a proceeding against the judgment-debtor after the issuing of an execution and before its return; and the third is by a proceeding against the debtors of the judgment-debtor, after the issuing of the execution and before or after its return. This includes the appointment of a receiver in the proceedings. *Moschell v. Boor*, 50 N. Y. St. Rep. 238. Although these proceedings are special proceedings, they are such in the action, and ancillary to the purpose of enforcing the collection of the judgment, which was one of the purposes for which the action was brought. And the legitimate remedies attendant upon the proceedings to render it effectual, so far as the orders of the court may be required, may be regarded as taken in the action. *Smith v. Tozer*, 3 id. 166, 366. In *Graves v. Scoville*, 12 Civ. Pro. Rep. 165, the court say: "A proceeding supplementary to execution is a special proceeding in the action, and the same presumptions exist since the enactment of the Code of Civil Procedure as under the Code of Procedure. This case was affirmed in the court of appeals without opinion. And see *Hyatt v. Dusenbury*, 5 N. Y. St. Rep. 848. But they are not a part of the action, and should not be entitled in the action. *Milliken v. Thompson*, 8 id. 106. There are important differences between supplementary proceedings under the Code of Procedure, and those under the Code of Civil Procedure. Under the former, they were proceedings in the action in which the judgment was recovered on which they were founded, and they were said to be in the nature of new remedies or equitable rights arising by force of the statute in the actions in which the judgments were recovered. They were expressly held not to be special proceedings (*Dresser v. Van Pelt*, 15 How. Pr. 19), but as much proceedings in the action as the issuing of the execution upon the judgment. *Wegman v. Childs*, 41 N. Y. 163. The proceedings are given to a judge and the court has no jurisdiction over or in them, except as provided by statute, and such as it has by virtue of its general supervisory power over inferior jurisdictions. In *Ross v. Wigg*, 39 Hun,

654, the court say, with reference to the declaration in the Code of Civil Procedure, that the remedies provided by section 2432 were "special proceedings:" "We do not regard this declaration of the legislature as indicative of any intent to change the character of the proceedings or as in any way diminishing the force of section 4, chapter 96, Laws 1857." In that case the question was whether the changes in the Code had ousted the recorder of the city of Oswego from jurisdiction under said section 4, and which under that section he had previously exercised in supplementary proceedings. That it was not such a change as defeated the jurisdiction of the recorder was all that the court decided or meant to decide.

3. Liens of creditor.—In *Mason v. Hackett*, 35 Hun, 238, a county judge had made an order for examination on a docketed justice's judgment for \$20 damages and \$7.85 costs—\$27.85, upon appeal from an order denying a motion to vacate said order of examination the court say: "Whenever the proceedings result in the appointment of a receiver, the title of all the judgment-debtor's real estate passes in trust to that officer. We think it clear that it was not the intention of the legislature to devote the debtor's property to the payment of judgments against him unless they, by the same statute, become liens thereon. The Code of Civil Procedure does not authorize the judge, before whom supplementary proceedings are pending, to order the application towards the payment of the judgment or the delivery or transfer to the receiver for such purpose of any other personal property."

A more serious question arises as to priority of lien to a fund in the hands of a debtor—of a judgment-debtor, between a judgment-creditor having an order for examination and one having an execution in the sheriff's hands. Thus, where a judgment-creditor after the return of an execution obtains an order for the examination of a debtor of his judgment-debtor, and afterwards another judgment-creditor of the same judgment-debtor causes an execution against the judgment-debtor to be placed in the sheriff's hands, and afterwards an order is made in the supplementary proceedings directing the said third person to pay his debt to the sheriff; but before such order is served on

the debtor of the judgment-debtor said debtor upon the sheriff's request pays his debt to the sheriff to be applied on the execution in his hands. The question as to which of the judgment-creditors is entitled to the fund, is still a mooted one. In *Duffy v. Dawson*, 46 N. Y. St. Rep. 268, Duffy recovered a judgment against Dawson February 2, 1892, for \$540, and issued an execution thereon the same day. On February 3d Duffy obtained an order for the examination of one Peetsch, as a third party, indebted to said judgment-debtor. On February 23, 1892, an order was obtained directing Peetsch to pay \$400, moneys in his hands, to the sheriff, to be applied in payment of Duffy's judgment. Peetsch paid said money to the sheriff. One Evans recovered a judgment against Dawson January 28, 1892, for \$177, and on the same day an execution founded on said judgment was issued to the sheriff. December 31, 1891, Dawson gave Evans an order on Peetsch for \$125 of said money, and Evans presented the said order to Peetsch, who acknowledged the receipt thereof. On March 8, 1892, Duffy applied for an order directing the sheriff to apply the said money to the payment of his judgment. This motion was denied, from which order Duffy appealed. The court at general term say: "The Code contains no provision for a levy on equitable interests in the hands of a third party, probably for the reason that the judgment-creditor has a more summary and effectual remedy, by supplementary proceedings, to examine the party owing the debt to the debtor, and by obtaining an order permitting the third party to pay over such debt to the sheriff to be applied on the execution. The execution, issued on the judgment of Evans, created no lien on this sum while in the hands of Peetsch, and none could be created thereon, except under section 2441. Sections 2447, 2448 and 2449 provide that where it shall appear that property of the judgment-debtor is in the possession or under the control of himself or some other person, the judge may, in his discretion, there being no receiver, make an order directing the judgment-debtor or such other person to deliver such property to the sheriff; when so delivered, the property is to be treated as if it had been levied upon by virtue of an execution."

4. **Where no lien attaches.**—The title to property previously transferred by the judgment-debtor does not vest in his receiver appointed in supplementary proceedings, and the latter has no prior or exclusive right to maintain an action to set aside such transfer as fraudulent. A judgment-creditor who has brought the first action to set aside such transfer has a lien and preference over the receiver and all other creditors upon the property sought to be reached, and is not a necessary or proper party to the receiver's action. This precise question was considered and decided in the case of *Bostwick v. Menck*, 40 N. Y. 383. The court in that case say : "He (the receiver) does not acquire the legal title to such property (fraudulently transferred) by his appointment, that is confined to property then owned by the debtor, and the fraudulent transferee of property acquired a good title thereto against the debtor, and all other persons except the creditors of the transferor; the only right of the receiver is, therefore, as trustee of the creditors." This question also arose in *Metcalf v. Del Valle*, 46 N. Y. St. Rep. 105, where the court say : "The receiver has no prior or exclusive right to maintain an action to set aside such assignment as fraudulent, and that the defendant Del Valle, having brought the first action against the judgment-debtor and his assignee, for the purpose of setting aside such assignment, has obtained a lien and preference over the receiver and all the other creditors upon the property sought to be reached."

II. WHAT STATUTORY RIGHTS CANNOT BE ENFORCED BY.

5. **In general.**—It is provided by section 2463 of the Code of Civil Procedure that where the judgment-debtor is a corporation created by or under the laws of this state, or a foreign corporation specified in section 1812, supplementary proceedings cannot be instituted against it to enforce the judgment, except in those actions or special proceedings brought by or against the people of the state. It also provides that in proceedings supplementary to execution a judgment-creditor is not entitled to seize, or interfere with, any property which is expressly exempt by law from levy and sale by virtue of an execution ; or any money, thing in action or other property held in trust for a judgment-

debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person, other than the judgment-debtor; or the earnings of the judgment-debtor for his personal services, rendered within sixty days next before the institution of the special proceeding; when it is made to appear, by his oath or otherwise, that those earnings are necessary for the use of a family, wholly or partly supported by his labor.

6. **Surplus premium in life insurance.**—As only such property as the judgment-debtor has at the time of the commencement of supplementary proceedings is affected thereby, a receiver in such proceedings cannot recover for excess of premiums paid by a judgment-debtor or out of his property, allowed by chapter 277 of the Laws of 1870. A receiver is not a creditor within the meaning of the statute. Whatever rights may accrue to the creditor under said statute may be enforced by him, and by him alone. *Masten v. Amerman*, 21 N. Y. St. Rep. 223.

7. **Surplus income of trust funds.**—A receiver of the property of a judgment-debtor, appointed in proceedings supplementary to execution, cannot maintain an action to reach any surplus income to the judgment-debtor under a trust created by a person other than the judgment-debtor. The power to proceed against the trust fund is confined to the judgment-creditor, who must proceed by a direct action. *Levey v. Bull*, 57 Hun, 350. Sections 1871–1879 of the Code provides, that when a trust has been created by one person for the benefit of another, which provides for the payment of the income trust fund to the beneficiary, a judgment-creditor of such beneficiary is entitled to maintain an action in equity to reach and recover the surplus income beyond what is necessary for the suitable support and maintenance of the *cestui que trust*, and those dependent upon him. *Tolles v. Wood*, 99 N. Y. 616. But in *Lawrence v. Pease*, 50 N. Y. St. Rep. 851, a third party order was granted against the trustee of the judgment-debtor's mother to pay the judgment from the interest of the judgment-debtor in trust funds.

8. **Lands conveyed to another.—Consideration.**—A receiver appointed in proceedings supplementary to execution cannot maintain an action to enforce the trust created by

the Revised Statutes (1 R. S. 728, § 52) in favor of the creditors of one paying the consideration for lands which are conveyed to another. The judgment-debtor has no interest, legal or equitable, in the lands bought by him but conveyed to another, and the creditor derives no right through him; if a creditor at the time of the conveyance, he has simply an interest created by the statute as *cestui que trust*; the trust does not rest in the receiver, and he is not the representative of the creditor in respect to it. *Underwood v. Sutcliffe*, 77 N. Y. 58. A receiver of a corporation organized under the General Manufacturing Act is not vested with the right of action given by that act (Laws 1848, ch. 40, § 10) to creditors of the corporation against stockholders thereof. *Farnsworth v. Wood*, 91 N. Y. 308.

9. Judgments against corporations.—It was held under the former Code that the provisions of that Code relating to supplementary proceedings applied to natural persons only. *Hinds v. C. & N. F. R. R. Co.*, 10 How. Pr. 487; *Sherwood v. Buffalo, etc., R. Co.*, 12 id. 136. These were cases of supplementary proceedings under judgments against domestic corporations, and it was decided that remedies against such corporations in case of insolvency, must be had under the provisions of the Revised Statutes. It is different where the judgment-debtor is a foreign corporation, not doing business in this state, nor having any business or fiscal agency therein, or agency for the transfer of its stock herein, and by section 1812 of the Code of Civil Procedure such a corporation is excluded from the operation of section 1810, providing for the appointment of receivers of the property of corporations. Section 2463 is a new provision, and seems by necessary implication, to authorize supplementary proceedings in a case like the one above referred to. It declares: "This article does not apply where the judgment-debtor is a corporation created under or by the laws of this state; or a foreign corporation specified in section 1812 of this act, except in those actions or special proceedings brought by or against the people of the state." Such a judgment-debtor is not one of the foreign corporations specified in section 1812. The article in which section 2463 is found is the one regulating proceedings supplementary to execution. Section 2435 authorizes supplementary

proceedings against a "judgment-debtor," making no distinction between a natural person and a corporation. Section 2458 requires that the execution, in case the judgment-debtor is not, when the execution is issued, a resident of the state, must have been issued to the sheriff of the county where the judgment-roll is filed, unless the execution was issued out of a court other than that in which the judgment was rendered, and in that case to the sheriff of the county where the transcript of the judgment is filed. Section 2452 provides how an order for the examination may be served upon a corporation. The only limitation upon the right to take proceedings supplementary to execution against any class of debtors is contained in section 2463, and this plainly does not embrace a foreign corporation doing no business and having no agency in this state. *Logan v. The McCall Publishing Co.*, 55 N. Y. St. Rep. 794. But as a general rule a judgment against a corporation cannot be enforced by proceedings supplementary to execution. Code, § 2463. After the return of execution unsatisfied, against a corporation, the remedy of the judgment-creditor is by sequestration of the property of the corporation and the appointment of a receiver. *Hinds v. C. & N. F. R. R. Co.*, 10 How. Pr. 487; *Fitchburg Nat. Bank v. Bushwick Chem. W'ks*, 13 Civ. Pro. Rep. 155. So a foreign corporation not having a place of business within the state cannot be examined as judgment-debtor for the purpose of the appointment of a receiver of its assets to be applied on an execution. *Stephens v. Page*, 54 N. Y. St. Rep. 133.

10. **Foreign ministers—Consuls, etc.**—Supplementary proceedings do not apply to the case of a foreign consul who has permitted judgment to be taken against him, and, if an order be obtained, he cannot be attached for refusal to obey it. *Griffin v. Dominguez*, 2 Duer, 656.

III. CONCURRENT REMEDIES.

A judgment-creditor may, during the pendency of supplementary proceedings, institute an action to make his judgment a lien on real estate transferred by the judgment-debtor to defraud his creditors. The creditor may prosecute both until satisfaction of his judgment. *Gates v. Young*, 17 Week. Dig. 551.

IV. TAX—PROCEEDINGS TO COLLECT.

Section 1 of chap. 640 of the Laws of 1881, provides as follows: "When a tax exceeding ten dollars in amount levied by the board of supervisors of a county against a person, firm, estate or corporation, residents thereof, or by the board of trustees of a village against a person, firm, estate or corporation, residents of the county in which such village, or the principal part thereof, is located, is returned by a town or village collector uncollected, for want of goods and chattels out of which to collect the same, the supervisor of the town or ward, or the county treasurer, and the president of a village, as to village tax, within one year thereafter, may apply on affidavit to the county judge or special county judge of the county, and obtain an order requiring such persons, firm, estate or corporation to appear before such county judge, or before a referee named in such order, and answer concerning his, their or its property. The same proceedings may in all respects be had as in cases supplementary to execution, and the same costs and disbursements may be allowed against the person, firm, estate or corporation examined, concerning his, their or its property, but none shall be allowed in his, their or its favor, provided that the proceeding be commenced within one year after the collector has made his return. This act applies to all villages whether incorporated by special acts or under the general acts. Upon an application to the county judge for an order for the examination of a delinquent taxpayer, the affidavit need not allege all the facts necessary to show jurisdiction in the assessors and supervisors. It is sufficient if the requirements of the statute are observed. *Matter of Conklin*, 36 Hun, 588. But if the assessment is void, the proceedings must be dismissed. *Inman v. Coleman*, 37 id. 170. The question whether the taxpayer had sufficient personal property from which the tax could have been made can only be investigated upon an independent motion to set aside the original order upon affidavit showing the facts. *Re Hartshorn*, 63 id. 536; 44 N. Y. St. Rep. 16; 17 N. Y. Supp. 567.

A dissolution of an order for examination in supplementary proceedings may be moved for on the ground that

the order was improvidently granted. *Bassett v. Wheeler*, 84 N. Y. 466.

Upon an appeal from a motion to set aside supplementary proceedings, the question whether the person proceeded against was a resident will not be reviewed in the court of appeals if the evidence is conflicting. *Id.*

A payment made as directed in supplementary proceedings, held a voluntary one in an action against the assessors for the lack of jurisdiction, the order itself not authorising seizure. *Drake v. Shurtliff*, 24 Hun, 422.

CHAPTER II.

JUDGMENTS.

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| I. JUDGMENTS THAT MAY BE ENFORCED BY.
1. Amount of.
2. Justice's court judgment must be filed during six years.
II. JUDGMENT OF A COURT NOT OF RECORD.
3. Amount of.
III. ORDER FOR PAYMENT OF MONEY. | IV. JUDGMENT BY CONFESSION.
V. JUDGMENT FOR DEFENDANT.
VI. JUDGMENT AGAINST JOINT-DEBTORS.
VII. JUDGMENT AGAINST INFANTS.
VIII. JUDGMENT OF FEDERAL COURTS.
IX. LIMITATION OF LIEN OF JUDGMENTS ON REAL ESTATE. |
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I. JUDGMENTS THAT MAY BE ENFORCED BY.

1. **Amount of.**—To entitle a judgment-creditor to maintain supplementary proceedings the judgment must have been rendered for a sum not less than twenty-five dollars. Code of Civ. Pro., § 2458. This provision renders obsolete most of the cases with reference to the amount of the judgment. It changes the rule in *Butts v. Dickinson*, 20 How. Pr. 230; *Anonymous*, 32 Barb. 201; *Vuttle v. Whitehead*, 2 Hilt, 596; *Wolf v. Jordan*, 22 Hun, 108. It allows the proceedings to be taken upon any judgment or decree of any court of this state, which was rendered for a sum not less than twenty-five dollars, provided the judgment was rendered upon the judgment-debtor's appearance or personal service of process upon him; and also provided that the debtor can be proceeded against by supplementary proceedings, and with the exceptions herein mentioned. Proceedings may be taken upon a judgment of a court of record irrespective of the amount due on the judgment at the time the proceedings are instituted if the judgment at the time it was entered amounted to twenty-five dollars. Because such judgment is a lien on and may be enforced against real estate, whatever its amount. 2 Til. & Sh. Prac. 855.

2. **Justice's court judgment must be filed within six years.**—If the judgment is of a justice's court, or other inferior court, it must be for at least twenty-five dollars; and a transcript of the judgment filed; and the judgment dock-

eted with the clerk of the county where it was rendered. *Stryburg v. Hicks*, 2 Law Bull. 6. The decisions bearing on the question of when supplementary proceedings may be had upon judgments of courts of justices of the peace, where a transcript thereof is filed in the county clerk's office, have become a snare into which the best practitioners may be entrapped unless they use the greatest care. It has therefore been found necessary to cite the different cases. It was held in *Davidson v. Horn*, 47 Hun, 51, that a justice's judgment must be docketed in the county clerk's office within six years from the time of its rendition, in order to be enforced by supplementary proceedings. The court in that case say : " There is no express statutory limitation of the time within which such a transcript may be filed and judgment docketed. The filing of the transcript and docketing the judgment is a proceeding taken *ex parte* to charge the judgment-debtor and his property, without his consent. The right of a judgment-debtor to avail himself of the statute of limitation as a bar, becomes perfect at the end of six years from the time the judgment is entered in the justice's docket. After such six years that right is a vested one. *Shriver v. Shriver*, 86 N. Y. 580 ; *Rider v. Wilson's Ex'rs*, 41 N. L. J. 99. The next case is *Bolt v. Hauser*, 33 N. Y. St. Rep. 343. It was there held that the six years' statute of limitations does not apply to supplementary proceedings to enforce a justice's judgment which has been docketed in the county clerk's office, and which is, therefore, made by statute a judgment of the county court. The judgment in that case was docketed in the county clerk's office the same day that it was rendered by the justice. Seven years afterwards a receiver was appointed of the judgment-debtor's property in supplementary proceedings founded on said judgment. The matter came to the general term, upon an appeal from an order denying a motion to set aside the order appointing the receiver. In that case the court ignores the case of *Davidson v. Horn*, but places great stress on the fact that the defendant appeared in person and by attorney at the hearing of the motion, and raised no objection. In *Rose v. Henry*, 37 Hun, 397, the question arose on a motion for leave to issue an execution, and the court say : " No time is prescribed within which the transcript of a justice's

judgment must be docketed in the county clerk's office." The above case is cited with approval in *Davidson v. Horn*, 47 Hun, 51; and it was held in *Townsend v. Tolhurst*, 32 N. Y. St. Rep. 21, that leave to issue execution upon a judgment of a justice of the peace may properly be granted after the lapse of more than six years after its rendition, when a transcript thereof was docketed in the county clerk's office within that time; that section 382, subdivision 7, of the Code does not extinguish or destroy the lien of a judgment so docketed. Thus we find the court still following the case of *Wattermire v. Westover*, 14 N. Y. 16, in which the court held that the statute of limitations did not extinguish or destroy the lien created by the judgment docketed in the county clerk's office. There is nothing in *Davidson v. Horn* which conflicts with what is said in *Townsend v. Tolhurst*. When we look at *Dieffenbach v. Roch*, 21 N. Y. State Rep. 570; 112 N. Y. 621, we find that that decision is simply to the effect that a judgment of a justice of the peace, docketed in the county clerk's office, is not a judgment "rendered" in the county court, but remains "a judgment rendered in a court not of record" within the meaning of the provisions of subdivision 7, section 382, of the Code of Civil Procedure, declaring that an action upon such judgment must be commenced within six years after the final judgment was rendered.

In 1894, the Legislature attempted to settle this question by inserting in section 376 of the Code of Civil Procedure the words "or hereafter docketed pursuant to the provisions of section 3017 of this act"; by inserting in subd. 7 of section 382, the words "where a transcript shall be filed pursuant to the provisions of section 3017 of this act," and by inserting in section 3017 the words, "if within six years after the rendition of the judgment.

II. JUDGMENT OF A COURT NOT OF RECORD.

3. Amount of.—Section 3043 provides that in case the judgment rendered in justice's courts, a transcript of which is filed in the county clerk's office, is for a sum less than twenty-five dollars exclusive of costs, the provisions of the statute relating to the satisfaction of an execution out of the judgment-debtor's real property are not applicable. In

Mason v. Hackett, 35 Hun, 240, the court say : " This provision (Code of Civ. Pro., § 2458), was not intended to change the provisions of the act that the judgment must be a lien upon the real estate, and is susceptible of that construction. The amendment was doubtless made to authorize proceedings after execution on the judgments rendered in courts of record, where the same is a lien upon real estate and there was no recovery for damages, but was rendered in favor of the prevailing party for costs. Whenever the proceedings result in the appointment of a receiver, the title to all his real estate passes in trust to that officer. We think it clear that it was not the intention of the legislature to devote the debtor's real property to the payment of judgments against him, unless they by the same statutes became a lien thereon." So far, therefore, as the above case goes, it holds that supplementary proceedings cannot be had upon a judgment of a justice's court, which is, when docketed, less than twenty-five dollars, exclusive of costs.

III. ORDER FOR PAYMENT OF MONEY.

An order directing the purchaser at a judicial sale to pay the amount duly ascertained and determined by the court to be the damages resulting from the refusal of such purchaser to complete his purchase, is to be regarded as a judgment of the court for all the purposes of supplementary proceedings. *Lydecker v. Smith*, 44 Hun, 454. So it seems that any order directing the payment of money, when enrolled and docketed as other judgments under rule 27 of the supreme court, may be enforced by supplementary proceedings. *Barnard v. Heydrich*, 2 Abb. N. S. 48.

IV. JUDGMENT BY CONFESSION.

Supplementary proceedings may be taken upon a judgment taken by confession. Appearance is predicable of every party, who submits himself to the jurisdiction of the court. The judgment-debtor, in a judgment by confession, does this by signing the statement of confession, and his appearance is complete when he verifies his statement. *Cooley v. Lawrence*, 12 How. Pr. 176.

V. JUDGMENT FOR DEFENDANT.

These proceedings may also be taken upon a judgment recovered in an action by the defendant in the action. It is a judgment in which there was an appearance by the judgment-debtor. The plaintiff appears by his commencing his action. *Davis v. Jones*, 8 Civ. Pro. Rep. 44.

VI. JUDGMENT AGAINST JOINT-DEBTORS.

Section 2461 of the Code prescribes, that when the execution was issued as prescribed by section 1941, the personal property owned by a defendant not summoned, jointly with the defendants summoned, may be reached. This section seems to be very ambiguous, when read in connection with section 1941 and other sections relating to joint-debtors. A debt due to, or other personal property owned by, one or more of the defendants not summoned, jointly with the defendants summoned, or with any of them, may be reached by supplementary proceedings. Where an execution on a judgment has been issued as prescribed in section 1941 of the Code, only the joint property of all, and the separate property of those served with the summons, can be reached. Code Civ. Pro.; § 2461. Only those served with the summons can be served with the order instituting the proceedings.

VII. JUDGMENT AGAINST INFANTS.

Supplementary proceedings may be taken upon a judgment recovered against an infant. In *Lederer v. Ehrenfeld*, 49 How. Pr. 403, the plaintiff, who was infant of about nineteen years of age, commenced an action against the defendant. On the trial the complaint was dismissed. On motion judgment was directed to be entered against the infant plaintiff. After the return of execution the judgment-creditor obtained an order for the examination of the plaintiff. The plaintiff moved to set aside the order on the ground that he was an infant. Such motion was denied.

VIII. JUDGMENT OF FEDERAL COURTS.

Supplementary proceedings cannot be taken on a judgment of a federal court, although such court is located in

this state. *Davis v. Burns*, 23 Hun, 648 ; *Tarbell v. Griggs*, 3 Paige, 207 ; but see *Telles v. Lynde*, 47 Fed. Rep. 912.

IX. LIMITATION OF LIEN OF JUDGMENTS ON REAL ESTATE.

By section 1251 of the Code, the lien acquired by the docketing of the money-judgment expires in ten years. This is extended an additional year by force of section 1380, which prevents the issuing of an execution against real estate of a decedent until one year after the death of the decedent. *Matter of Holmes*, 42 N. Y. St. Rep. 641. The lien of a judgment on real property cannot be extended beyond that time, as against *bona fide* purchasers and incumbrances, by the levy of an execution ; the sale on execution must take place within ten years, unless stayed by injunction or appeal. *Darling v. Littlejohn*, 12 N. Y. Supp. 205. The time during which a judgment-creditor is stayed by an injunction or other order, or by the operation of an appeal, or by express provision of law, from enforcing a judgment, is no part of the ten years, as against the judgment-debtor. But it is different as against a purchaser, creditor, or mortgagee in good faith. § 1225. A judgment is presumed to be paid after twenty years. *Id.* 376.

CHAPTER III.

EXECUTION.

I. OF EXECUTION.

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| 1. In general.
2. Against property.
3. Form of.
4. Issue after five years.
5. Who must issue when judgment was taken in justice's court.
6. Objections must be taken when.
7. Sufficiency of return.
8. When execution must be returned. | 9. What amounts to a return.
10. Second execution after order for examination.
11. Ten years limitation after execution.
12. Levy of execution on real estate after ten years.
13. Countermand of execution—Effect of a receiver.
14. Joint-debtors. |
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I. OF EXECUTION.

1. In general.—The execution upon which supplementary proceedings are based, must be issued out of a court of record to the sheriff of the county where the judgment-debtor has, at the time of the commencement of the special proceedings, a place for the regular transaction of business in person ; or, if he is then a resident of the state, to the sheriff of the county where he resides ; or, if he is not then a resident of the state, to the sheriff of the county where the judgment-roll or transcript of the judgment of the inferior court is filed. Code Civ. Pro., § 2458. The word “then” refers to the time of the commencement of the special proceedings and the use of the present tense of the verbs in the phrases “has a place of business,” “is then a resident,” and “where he resides,” plainly show that the reference throughout is to the present residence, etc., of the judgment-debtor at the time the application for the order is made. The proof must show that the execution was issued to the sheriff of the county where the judgment-debtor then presently resided. *Schenck v. Erwin*, 38 N. Y. St. Rep. 603. The transcript spoken of is that from a justice or other inferior court in which judgment was rendered and which is filed with the clerk of the county where the court is located. Code Civ. Pro., § 2458. Section 172 provides that in an action or special proceedings, to which the sheriff of a county is a party, a coroner of the

same county has all the power and is subject to all the duties of a sheriff, in a cause in which a sheriff is not a party, and section 1362 provides that an execution must be directed to the sheriff, unless he is a party or interested, in which case it must be directed to the coroner. But the court may order an execution issued upon a judgment rendered against a sheriff to be directed to a person designated in the order instead of the coroner. Whether an order in these proceedings can be maintained where an execution is issued to the coroners, or to a coroner of the county, or to a person designated by an order of the court, seems not to have been expressly decided, as no reported case has been found under the Code of Civil Procedure relating to this point. It seems, however, that a judgment against a person who is at the time a sheriff of the county may be enforced by supplementary proceedings.

2. Against property.—The execution must be one against property, both real and personal, to collect a definite sum of money. *Dix v. Briggs*, 9 Paige, 595.

3. Form of.—The judgment and execution must describe the party whose property is sought to be taken, and so an execution against Truman Hildreth will not authorize a sale of the property of Freeman Hildreth, although the latter may be the person intended. *Farnham v. Hildreth*, 32 Barb. 277. It seems that an execution cannot be issued upon a judgment of an inferior court not of record where the transcript was not filed until after the expiration of the six years limitation to sue on such a judgment. *Lewis v. Acker*, 7 Week. Dig. 169. But an execution is not rendered void by the omission of a clause requiring the sheriff to return it within sixty days. An omission in an execution of a teste in the name of a judge of the court, or a direction as to the time of its return, is a mere irregularity which may be amended or disregarded. *Douglass v. Haberstro*, 88 N. Y. 611; *People v. Bowe*, 21 Hun, 614. An execution that does not contain the recitals that the judgment had been docketed in the county to which it was issued is fatally defective. *Nans v. Oakley*, 39 N. Y. St. Rep. 327. An execution which is void is no protection to the officer executing it. *Dunham v. Reilly*, 18 id. 36-41. An execu-

tion must be directed to the sheriff of the county where the judgment is docketed. *White v. Coulter*, 59 N. Y. 629.

4. Issue after five years.—The party recovering a judgment, or his legal representatives or assignee, may have execution thereupon, of course, at any time within five years after the entry of the judgment. Code, §§ 1375–1376. But not against the property of a deceased judgment-debtor. After the lapse of five years from the entry of a final judgment execution can be issued thereupon in one of the following cases only :

1. When an execution was issued thereupon within five years after the entry of the judgment and has been returned wholly or partly unsatisfied or unexecuted.

2. Where an order is made by the court granting leave to issue the execution. Code Civ. Pro., § 1377. In *Hutson v. Weld*, 38 Hun, 142, the court say: "There can be no doubt that the affidavit is defective. It is so because it does not appear that the execution was issued within the five years allowed after judgment by section 1375 of the Code, or if after the expiration of the five years, under such circumstances as justified that ceremony, namely, that an execution had been issued by leave of the court after the expiration of five years." The question in this case arose under section 2463 of the Code of Civil Procedure.

5. Who must issue when judgment was taken in justice's court.—An execution upon a judgment recovered in a justice's court and docketed in a county clerk's office, must be issued by the county clerk. Code, § 3043. And any other execution is a nullity, and supplementary proceedings cannot be founded thereon. *Merritt v. Judd*, 18 Civ. Pro. Rep. 159. So where a judgment has been obtained in a justice's court in another county, and a transcript filed in the county clerk's office in said county, a transcript of the docket of which is filed in New York county, the execution in New York county must be issued by the county clerk out of the court of common pleas. *Gray v. Leiben*, 8 id. 48.

6. Objection must be taken—When.—The validity of the execution cannot be questioned, except upon a motion to set aside the proceedings. *Hilton v. Patterson*, 18 Abb. 245; *United States L. & E. Co. v. Pike*, 2 Law Bull. 31. If

the debtor's attorney appears and makes no objection, it is a waiver of all objections to the regularity of the proceedings. *Underwood v. Sutcliff*, 10 Hun, 453.

7. Sufficiency of return.—Proceedings under subdivision 1 of section 2432 of the Code, cannot be instituted until the remedy by execution is exhausted. In *First Nat. Bank of Canandaigua v. Martin*, 49 Hun, 573, the court say: "The proceedings are supplementary to the execution, and are not intended to take the place of, or to be a substitute for, the execution. The judgment is a lien upon the real estate of the judgment-debtor. The judgment-creditor has the right to sell the real estate upon the execution, and until it has exhausted its remedy by execution these proceedings are not available. If the plaintiff should be permitted to procure the appointment of a receiver, and thus vest the title of the real estate of the judgment-debtor in such receiver, it could be sold and the judgment-debtor deprived of the right of redemption which is given to him in case of a sale by execution. It was the duty, therefore, of the plaintiff to have caused the judgment-debtor's real estate to be sold on execution, thus exhausting its remedy by execution before resorting to these proceedings.

8. When execution must be returned.—An execution may be returned at any time after it is issued, and supplementary proceedings may be taken immediately thereon. And it is immaterial that the return was made before the expiration of sixty days, at the creditor's request, if there is no collusion with the sheriff to procure a return *nulla bona*, without an attempt in good faith to find goods subject to levy. *Forbes v. Waller*, 25 N. Y. 430; *Sperling v. Levy*, 10 Abb. 426. Except the case of *First Nat. Bank of Canandaigua v. Martin*, 49 Hun, 573, I am not aware of any case permitting the question to be raised that there was property which the sheriff ought to have taken and sold for the purpose of satisfying the judgment, in whole or in part. And I apprehend that this question, under such circumstances, cannot be raised. The judgment-creditor having done all that the law requires of him, may act safely upon the return of the sheriff. The question is one of jurisdiction. The statute says: "When the execution shall have been returned unsatisfied, in whole or in part, the

judgment-creditor is entitled to an order from a judge." It seems that such return is made the evidence upon which the jurisdiction depends, assuming, of course, that the judgment-creditor has performed all that the law requires of him, and has not improperly interfered with the sheriff. The ground upon which the jurisdiction of the judge rests is, that the legal remedy has been exhausted without satisfaction of the judgment, and certainly the best, if not the only evidence of the fact, is the official return of the sheriff. Upon any other view the question whether there was property subject to an execution or not, would be open to be litigated by the parties in every proceeding of the kind in question, and to be decided by the court upon the testimony produced. In *Pudney v. Griffith*, 15 How. Pr. 410, the plaintiff gave directions to the sheriff as to the time of the return, and instructed him not to proceed to serve the execution. In *Spencer v. Cuyler*, 17 id. 158, the plaintiff or his attorney interfered with the sheriff, and requested him to return the execution immediately, and he did so. In *First Nat. Bank of C. v. Martin*, 49 Hun, 573, the question arose on two orders, one directing the conveyance and delivery of real estate to a receiver of the defendant, and the other adjudging him in contempt for refusing to obey the first-mentioned order. In *Forbes v. Waller*, 25 N. Y. 434, the question arose in an action to set aside an assignment for the benefit of creditors. In that case the court say: "Before resorting to the equitable powers of the court to compel the satisfaction of a judgment out of the choses in action of the debtor, it is fit and proper that the legal remedy should be exhausted, not only in form, but in reality and in good faith.

Hence, it was held that the debtor could not be subjected to the costs and annoyance of a creditor's bill until the return day of the execution had passed. *Cassidy v. Meacham*, 3 Paige, 311; *Platt v. Caldwell*, 9 id. 386. The court farther say: "The question whether the Code had or had not affected the rule established under the Revised Statutes, that the legal remedy was not exhausted until the return day of the execution is passed, and regarding the return day as not arriving until sixty days after the receipt of the execution by the sheriff, was not made upon the trial, and will

not be considered." Again the court say : "The judge did not decide, and was not called upon to decide, that the full term of sixty days must elapse after the delivery of the execution to the sheriff before the action could be brought." There is nothing in *Iselin v. Henlein*, 16 Abb. N. C. 73, that controverts the doctrine laid down in *Cassidy v. Meacham*, 3 Paige, 312.

9. **What amounts to a return.**—Section 2435 of the Code of Civil Procedure, like those of the Code and of the Revised Statutes, require the return of an execution upon the judgment wholly or partly unsatisfied. It is this return which the sheriff makes that the execution is unpaid wholly or in part, and not the mere filing of the process, with which the court deals in determining whether the remedy at law has been exhausted. *Iselin v. Henlein*, 16 Abb. N. C. 73. In *Cassidy v. Meacham*, 3 Paige, 312, the court say : "The creditor must set out the issuing of the execution, the time at which it was returnable, and the actual return of the sheriff thereon, in such a manner that the court can see that the remedy at law has been legally exhausted." In *Clark v. Dakin*, 3 Barb. Ch. 36, the court held that the sheriff's return upon the writ, and not the filing thereof, was the important thing and say : "For the remedy at law is exhausted by the sheriff's return upon the execution, which is all that is necessary to give the court jurisdiction." In *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12-19, the court say : "Although the indorsement of the execution *nulla bona* was not filed it was actually made, which, with the other facts alleged may be regarded as a substantial compliance with the equity rule." In *Marks v. Spaulding*, 35 Hun, 478, the question arose on a motion to set aside orders for the examination of the judgment-debtor. In that case the sheriff made an equivocal return. The court will not go behind the return except in a direct motion to set it aside made by the debtor. *Tyler v. Willis*, 33 Barb. 327 ; 12 Abb. 465 ; *Sperling v. Levy*, 10 id. 426 ; *Wright v. Nostrand*, 94 N. Y. 33.

Amendable defects in.—In *Wright v. Nostrand*, 94 N. Y. 47, the court say : "We are of the opinion that the execution in question, although extremely defective, and subject to be vacated and set aside on motion, for informality, was

yet not so defective that it can be treated as void, when questioned in a collateral proceeding. Most of the defects appearing in the execution have been held to be amendable, and defects of that character can only be taken advantage of by the defendant in the execution in a direct proceeding to set it aside. A variance between the amount of an execution and the judgment will not vitiate the execution. *Boreland v. Stewart*, 4 Wend. 568; *Jackson v. Page*, id 587. If any sum whatever be due upon a judgment, an execution issued thereon, which claims too much, is not void. *Peck v. Tiffany*, 2 N. Y. 451. An execution which gives unauthorized directions as to its return is not void, as the law prescribes the sheriff's duty in making returns, and he is not controlled by such directions. *Hutchinson v. Brand*, id. 208. The amount named in the execution may be amended so as to make it conform with the amount of the judgment. *Oakley v. Becker*, 2 Cow. 454. Errors in the description of the court where the judgment was obtained, and the place where the judgment-roll was filed, have been held amendable. *Abels v. Westervelt*, 15 Abb. 230. Where an execution issued upon a justice's judgment, and filed in the county clerk's office, was not signed by the clerk, held sufficient to protect the officer executing it. *Hill v. Haynes*, 54 N. Y. 153.

10. Second execution after order for examination.—The institution of supplementary proceedings after the return of an execution does prevent the issuing of another one upon the same judgment. *Gates v. Young*, 17 Week. Dig. 551. But if under the second execution the sheriff levies upon property of the judgment-debtor it suspends the other remedies of the plaintiff until a return is made by the sheriff. *Steinhardt v. Michalda*, 15 Civ. Pro. Rep. 323. But in *Farqueharson v. Kimball*, 18 How. Pr. 33, it is held, that the issuing of a second execution against a judgment-debtor and a levy by the sheriff under it do not prevent the issuing of an order for the examination of the judgment-debtor where the first execution has been returned unsatisfied. After filing a creditor's bill under the old system the complaint might have taken out a new execution upon his judgment and levy upon the property of the judgment-debtor, and should such property be

insufficient to satisfy the judgment he would not have been compelled to elect either to dismiss his bill or abandon his execution. *Salt v. Lawson*, 4 Sand 718; *Lilliendahl v. Teller*, 11 How. Pr. 528. These rules of the old court of chancery are just as applicable to the examination of a debtor under the Code as to the proceeding by bill.

II. Ten years limitation after execution.—The court of appeals, in *Conyngham v. Duffy*, 34 N. Y. St. Rep. 736, settled the question of limitation, overruling the case of *Bean v. Tonnelle*, 24 Hun, 354; *Levy v. Kirby*, 7 Civ. Pro. Rep. 98. In *Conyngham v. Duffy*, the court says: "By section 388 of chapter 4, ten years is fixed as the limitation in all cases not specially prescribed in the first two titles, and while the chapter speaks of actions and the time at which the causes of actions accrue, the latter sections, 414, 415, include special proceedings and the securing of rights to institute the same. And hence it follows that by chapter 4 a limitation for the institution of supplementary proceedings is fixed at ten years from the accruing of the right." The judgment creditor is, therefore, limited to the term of ten years from the return of the first execution in which to assert his right to supplementary proceedings. And unless the affidavit or proof upon which the order for the examination of the judgment-debtor is founded shows such fact the order may be vacated. *McGuire v. Hudson*, 41 N. Y. St. Rep. 295. In *Baumler v. Ackerman*, 43 id. 87, judgment was recovered November 1, 1876, and an execution issued thereon on the same day which was returned unsatisfied. A second execution was issued upon the judgment, April 17, 1891, which was returned wholly unsatisfied, and an order was obtained for the examination of the judgment-debtor. Upon motion this order was set aside on the ground that more than ten years having elapsed after the return of the first execution, and the statute of limitation had run against plaintiff's right thereto. The court say: "We think his right to institute the proceedings had expired by limitation of time." The judgment had ceased to be a lien upon the real property of the defendant when the proceedings were instituted. The execution was ineffectual, therefore, to reach that class of property. It was held in *Dix v. Briggs*, 9 Paige, ch. 596, that in order to

institute a creditor's bill there must have been issued and returned an execution against real property. Whether supplementary proceedings can be maintained on a judgment recovered more than ten years before the issue of the first execution thereon seems not to have been settled. So the question, whether these proceedings can be instituted on a judgment after twenty years from the time it was docketed, is still unsettled. The words of section 2435 of the Code are: "At any time within ten years after the return, wholly or partly unsatisfied, of an execution against property * * * the judgment-creditor is entitled to an order.

Suppose that the first execution on a judgment was issued more than ten years after the judgment was docketed by virtue of an order granting leave therefor, made prior to the expiration of the ten years in which such judgment was a lien on real property. Could an order be granted after twenty years from the time of the docketing of the judgment and within the ten years after the issuing of said execution, and, if so, could a receiver be appointed in such proceedings? If a receiver could be appointed at such time, would he by virtue of his office be vested with the title of the judgment-debtor's real estate? No reported case has been found relating to this point.

In *Evans v. Hill*, 18 Hun, 464, it was held that a judgment-creditor's action will not lie where more than ten years has elapsed since the docketing of the judgment and no new lien upon the land has been acquired by the levy of an execution thereon. But it does not state how it would be in regard to personal property, choses in action, etc. All that was said in *Palen v. Bushnell*, 21 N. Y. St. Rep. 867, is that section 376 of the Code does not apply to a remedy founded upon a judgment instituted before the period mentioned had elapsed. The court, in *Baumler v. Ackerman*, says: "It is suggested by the appellant that provision is made for such proceedings after the lapse of ten years by section 1252 of the Code of Civil Procedure. That section has relation only to judgments rendered after the adoption of that section into the Code."

12. Levy of execution on real estate after ten years.—After the ten years prescribed by section 1251 of the Code,

a judgment-creditor may obtain a lien and levy upon the real property of the judgment-debtor by issuing an execution to the sheriff and by filing with the clerk of the county a notice subscribed by the sheriff, describing the judgment, the execution and the property levied upon. The notice must be recorded and indexed by the clerk. Code Civ. Pro. § 1252.

13. Countermand of execution—Effect of, on receiver.—Where a receiver has been appointed, a countermand of the execution subsequent to such appointment will not render the order void until it has been vacated by the judge or court in which the proceeding is pending. *Palmer v. Colville*, 45 N. Y. St. Rep. 706.

14. Joint debtors.—The execution mentioned in section 2461, to be issued under section 1941, is one to collect the balance remaining unpaid on a joint demand after the joint property has been exhausted upon a prior execution.

CHAPTER IV.

BY AND AGAINST WHOM PROCEEDINGS MAY BE INSTITUTED.

I. BY WHOM.

1. In general.
2. Personal representatives.

II. AGAINST WHOM.

3. Third persons.

III. RESIDENCE AND PLACE OF EXAMINATION OF DEBTOR OR THIRD PARTY.

I. BY WHOM PROCEEDINGS MAY BE INSTITUTED.

1. **In general.**—Any judgment-creditor, be he plaintiff or defendant in an action, may institute the proceedings; so also may the assignee of a judgment. *Frederick v. Decker*, 18 How. Pr. 96. Whether he is such by a special or a general assignment and after the death of the party recovering the judgment. *Crill v. Kornmeyer*, 56 How. Pr. 276. A receiver of the property of the judgment-creditor is in the position of an assignee of the judgment (*Moore v. Taylor*, 40 Hun, 56), and may institute supplementary proceedings. But all papers should be indorsed with the name and address of the assignee and show how they are entitled to the remedy. *Wright v. Nostrand*, 94 N. Y. 31. A judgment-creditor of an estate allowed by a surrogate to issue execution is not authorized to institute these proceedings. *Collins v. Beebe*, 27 N. Y. St. Rep. 4; 54 Hun, 318. A sheriff holding an attachment against a debtor may maintain these proceedings upon a judgment in favor of such debtor. Code § 655, subd. 1.

2. **Personal representatives.**—Where the party recovering a final judgment has died, execution may be issued at any time within five years after the entry of judgment by his personal representatives, as of course. But the execution must be indorsed with the name and residence of the person issuing the same. Code, § 1376. But failure to indorse upon the execution the statement that it was issued by the personal representatives of the deceased judgment-creditor, will not invalidate the proceedings, where no objection is made until after appointment of receiver. *Deyo v. Borley*, 43 N. Y. St. Rep. 638. It was provided by section 283 of the Code of Procedure, that the personal

representatives of a deceased judgment-creditor may, at any time within five years after the entry of the judgment, institute proceedings supplementary to execution, to enforce the same. *Collier v. Devere*, 7 Hun, 61. And the court in *Pardee v. Tilton*, 20 id. 76, say : "Such right was reserved and continued in full force by the qualification of the repealing clause of the Laws of 1877, chap. 417, subd. 8, § 1. And where an execution was issued upon the judgment and returned unsatisfied, in the lifetime of the judgment-creditor, his representatives may, upon showing that fact, prosecute supplementary proceedings without issuing a new execution." *Walker v. Donovan*, 53 How. Pr. 3. But whether under the Code of Civil Procedure such proceedings must be commenced within five years after the entry of the judgment, does not seem to have been settled. A sheriff holding an attachment may maintain such proceedings in his own name, or in the name of the defendant in the action in which the attachment is issued. Code, § 655, subd. 1.

II. AGAINST WHOM.

As a general rule, supplementary proceedings may be maintained against any person against whom a money judgment can be enforced. Thus, they may be maintained against an infant. *Lederer v. Ehrenfeld*, 49 How. Pr. 403. But they cannot be maintained against a person who, since the recovery of the judgment, has been discharged under the Two-thirds Act. *Smith v. Paul*, 20 How. Pr. 97; *Robens v. Sweet*, 48 Hun, 436. Nor a foreign minister or consul; *Griffin v. Dominguez*, 2 Duer, 656. Nor against a corporation as a judgment-debtor; *Hinds v. Canandaigua & N. F. R. Co.*, 10 How. Pr. 487; Code Civ. Pro., § 2463. Nor against a debtor, while he is under arrest on execution against his person, issued upon the judgment. *Cooper v. Bigelow*, 1 Cow. 56. Nor against an estate of a deceased judgment-debtor, where an execution has been issued by leave of the surrogate. In *Collins v. Beebe*, 54 Hun, 318; 27 N. Y. St. Rep. 4, the court say: "The judgment was recovered against the defendants as executors; it was not a judgment attended with the ordinary right of the plaintiff to issue execution upon it, or in any manner to interfere with the property of testator's estate, but the surrogate was author-

ized to permit an execution to be issued. But the plaintiff is not authorized to proceed further."

3. Third persons.—Proceedings for the examination of a third party as to property in his hand belonging to the judgment-debtor, cannot be maintained where the judgment-debtor at the time is exempt from examination, as in the case of a corporation. *Fitchburgh Nat. Bank v. Bushwick Chem. Works*, 13 Civ. Pro. Rep. 155. Nor when the third party has possession of the property as trustee or receiver. *Smith v. McNamara*, 15 Hun, 447. Nor where an order for examination has not been served upon the judgment-debtor. *Merrill v. Allin*, 46 Hun, 623; *People ex rel. Grant v. Warner*, 51 id. 53. But it seems that the court has overlooked the last phrase of section 2432, which provides that "The proceedings under subdivision third, against third persons, may be pursued either alone or simultaneously with the proceedings under either subdivision first or subdivision second. A creditor can, if he desires, at any time, institute proceedings against any person who may reside in any county of the state, whether an execution has or has not been issued to the sheriff of the county where such person resides.

III. RESIDENCE AND PLACE OF EXAMINATION OF DEBTOR OR THIRD PARTY.

In order to maintain supplementary proceedings, it must appear that the execution was issued to the sheriff of the county where the judgment-debtor has, at the time of the commencement of the proceedings, a place for the regular transaction of business in person; or, if he is then a resident of the state, to the sheriff of the county where he resides. If he is not a resident of the state, to the sheriff of the county where the judgment-roll or a transcript of justice's judgment is filed. Code Civ. Pro., § 2458. Where, after the execution is issued and before an application for an order is made, the judgment-debtor removes from the county to which the execution was issued, an execution must be issued to the county in which he resides at the time of the application for an order. *Schenck v. Erwin*, 38 N. Y. St. Rep. 603.

In order to examine a non-resident of the county, it must appear, in the language of the Code, that the defendant has,

within the county where the application for the order is made, an office for the regular transaction of business in person, as contradistinguished from cases where he transacts the same through agents. *Bowen v. Gump*, 59 How. Pr. 507. But it need not be his principal place of business. *McEwan v. Burgess*, 25 id. 92.

Where a person resides in one county and has a place for the regular transaction of business in person in another county, then the execution may be issued to either county. But a person working for the government in a particular office away from the county of his residence has not thereby a place of business in the county where he works. *Belknap v. Hasbrouck*, 13 Abb. 418. The court, in *Merrill v. Allin*, 46 Hun, 623-627, construed the provisions of section 2434 of the Code to be that either special proceedings may be instituted before a judge of the court, out of which, or the county judge, or special county judge, of the county to which an execution has been issued, to mean the county judge or special county judge of the county to which an execution has been issued—as provided by section 2458. That proceeding to compel the appearance and examination of a person indebted to the judgment-debtor must be instituted in the county where the judgment-debtor resides. If such third party resides in another county he must be examined before a referee in the county where he resides. The case of *Foster v. Prince*, 18 How. Pr. 258, and *Gould v. Moore*, 51 id. 188, have been rendered obsolete by the later general term decisions. In *Anway v. David*, 9 Hun, 296, the question was as to the examination of a judgment-debtor who resided in New Jersey. The judgment-roll was filed in King's county, and a transcript of it filed in New York county, execution was issued to New York county where the judgment-debtor had a place for the transaction of business in person. It seems that so much of said decision as holds that the issue of the execution to New York county was sufficient, has been rendered obsolete by subdivision 2 of section 2458 of the Code of Civil Procedure.

The Code of Civil Procedure does not in express terms prescribe in what county a non-resident judgment-debtor who has no office for the transaction of business within this

state can be compelled to attend and be examined. But it must be inferred from the construction placed upon subdivisions 1 and 2 of section 2458, that the judgment-debtor mentioned in subdivision 3 of said section cannot be compelled to attend at a place without the county wherein the judgment-roll, or where the judgment was rendered in a justice's or other court not of record, in the county where the judgment was taken, and a transcript thereof filed. *Merrill v. Allin*, 46 Hun, 623; *Anway v. David*, 9 Hun, 296. But can a non-resident judgment-debtor, not having an office within the state, be required to appear and be examined in the county where the judgment-roll is filed, unless the order is served upon him within said county? This question seems not to have been expressly decided. What was said on this point in *Anway v. David*, id., was not necessary to the decision of that case. *Wilson v. Andrews*, 9 Hun, 39. All the provisions of the statute authorizing and regulating the proceedings are to be construed, so as to constitute a harmonious system. And as the judge before whom the matter is pending can appoint a referee to take testimony in any county of the state it seems that he can by order compel the attendance of the judgment-debtor before such referee in any county in which he may be found. Code, § 2442. A warrant of arrest under section 2437 may issue upon proper proof against a non-resident judgment-debtor. *Denning v. Schieffelin*, 26 N. Y. St. Rep. 96. An order to examine a third person under section 2441 of the Code must be made by the judge of the county in which the judgment-debtor resided at the time of the commencement of the proceedings, no matter where such third party resides. *Schenck v. Erwin*, 43 N. Y. St. Rep. 862. Such order it seems can only be made after an order has been duly served upon the judgment-debtor. *Merrill v. Allin*, 13 id. 20; 46 Hun, 623. But see last phrase of section 2432 of the Code of Civil Procedure.

CHAPTER V.

PROCEEDINGS AFTER RETURN OF EXECUTION.

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| <p>I. PROCEEDINGS AFTER RETURN OF EXECUTION.</p> <p>1. Two separate and distinct proceedings.</p> <p>II. AFFIDAVIT.</p> <p>2. Necessary—When.</p> <p>3. By whom made.</p> | <p>4. Contents of affidavit.</p> <p>5. For second or subsequent orders.</p> <p>6. Affidavit for order after return of execution.</p> <p>7. Affidavit for order after return of execution on justice's court judgment.</p> |
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I. PROCEEDINGS AFTER RETURN OF EXECUTION.

1. Two separate and distinct proceedings.—It seems that the two proceedings provided for by subd. 1 of section 2432 of the Code are in many respects separate and distinct, and that the order is independent of the warrant. Upon this point the court, in *Frost v. Craig*, 30 N. Y. St. Rep. 849, says: "The judges of the city court properly decided that the warrant upon which these proceedings were instituted (Code, § 2438) was independent of the previous order for examination, and that the vacating of such previous order did not affect the warrant. The Code permits the supplementary proceedings to be instituted by warrant instead of by order (section 2437), and also permits the warrant to be issued at any time after an order is granted, but it does not appear that in the latter case the subsequent vacating of the order requires the vacating of the warrant. This section provides that the judge may, if necessary, direct the adjournment, or if the return-day of the order has elapsed, the continuance of the proceedings under the order until after the return of the warrant and his decision thereupon. This shows that the judgment-creditor may abandon the proceedings instituted by the order and elect to proceed under the warrant, or may keep the proceedings under the order alive until his right to proceed under the warrant is established. But the complete independence of the two proceedings is thus clearly indicated." In order to give the court jurisdiction to issue a warrant there must be proof entitling the judgment-creditor to an order for the examination of the judgment-debtor, that is to say, the

judgment-creditor must make it appear by affidavit, or other competent written evidence, that an execution out of a court of record upon a judgment for money rendered for a sum not less than twenty-five dollars upon the judgment-debtor's appearance or personal service of the summons upon him against the property of the judgment-debtor, or of one of several debtors in the same judgment, issued to the sheriff of the county where the judgment-debtor at the time of the application for the order is made, resides, or has an office for the transaction of business in person, or if he does not reside in the state, to the sheriff of the county where the judgment-roll or the transcript of a judgment of a court, not of record, is filed, has been returned unsatisfied in whole or in part.

II. AFFIDAVIT.

2. Necessary—When.—Sections 2435 and 2441 prescribes that proof of the facts entitling a party to an order or warrant must be by affidavit or other competent written evidence. And while it has been held that an affidavit is not absolutely necessary as a foundation for an order for examination (*Collier v. De Revere*, 7 Hun, 61), it seems that the construction placed by the courts upon these proceedings since the adoption of the Code of Civil Procedure makes an affidavit absolutely necessary on which to predicate an order, except for a contempt of which the judge has judicial knowledge. It seems that an affidavit is necessary in some cases at least to show that the first execution upon the judgment upon which the proceedings are predicated was returned within ten years from the time of making the application for the order. *Baumler v. Ackerman*, 43 N. Y. St. Rep. 87. *Conyngham v. Duffy*, 34 id. 736; 125 N. Y. 200. An affidavit is also necessary to show that at the time of the application for the order the judgment-debtor is either a resident of, or has an office for the transaction of business in person, in the county to which the execution was issued; or that he is a non-resident of the state. *Schenck v. Erwin*, 38 N. Y. St. Rep. 603; *Arnot v. Wright*, 29 id. 425. The matters prescribed by rule 25 of the supreme court should also appear by affidavit, or it should appear that no previous application for the order

has been made to any judge. *Ludlow v. Mead*, 21 N. Y. St. Rep. 435. Where the judgment upon which the execution was issued and the application founded was rendered in a justice's or other inferior court, it must appear that a transcript thereof was duly filed in the county clerk's office of the county in which the judgment was taken within six years after its rendition. *Davidson v. Horn*, 47 Hun, 51. An affidavit is also necessary on which to found an order for the examination of a person indebted to the judgment-debtor. It is not sufficient to show that the execution has been returned "unsatisfied" "or partly unsatisfied," the amount remaining unsatisfied should be specified, and this can only be shown by affidavit. *Douglass v. Mainzer*, 40 Hun, 75. Where the application is made by one in no way a party to the record it is necessary to show by affidavit by what right he moves in the matter. *Brown v. Walker*, 28 N. Y. St. Rep. 36. An affidavit is absolutely necessary upon which to predicate a warrant for the arrest of the judgment-debtor in supplementary proceedings. Code, § 2437.

3. By whom made.—The affidavit upon which to predicate an order for the examination of a judgment-debtor, or a person indebted to a judgment-debtor, may be made by the judgment-creditor, his agent or attorney. But it must appear by the written proof that the proceedings are taken by the owner of the judgment. *Brown v. Walker*, 28 N. Y. St. Rep. 36. Where the affidavit is made by an agent, it must show that the agent is authorized to institute that particular proceeding. The nature of the agency must be stated. *Hawes v. Barr*, 7 Robt. 452. Where an assignee seeks to examine a judgment-debtor, he must show in his affidavit that he has a right to proceed upon the judgment, and by what right he moves in the matter. *Frederick v. Decker*, 18 How. Pr. 96. Where executors or administrators make application for an order, they must show the death of the judgment-creditor, their appointment and qualification, and that five years have not elapsed since the entry of the judgment. *Collier v. DeRevere*, 7 Hun, 62. It should also state that the execution was issued as prescribed by the Code of Civil Procedure. *Deyo v. Borley*, 43 N. Y. St. Rep. 638.

An affidavit to begin proceedings executed by one in no way a party to the record, is defective. *Brown v. Walker*, 28 N. Y. St. Rep. 36. But where the affidavit is made by the attorney of record of the judgment creditor, the court must take notice of his authority to prosecute the proceedings. *Id.* If the party making the affidavit is neither the judgment-debtor, nor assignee, nor legal representative, nor attorney, nor agent, the affidavit must show that the affiant is acquainted with the facts and that the application is made at the request of, or procured by, the creditor or owner of the judgment.

4. Contents of affidavit.—In order to entitle the judgment-creditor to maintain supplementary proceedings of any kind, he must show by affidavit or other written evidence, that a judgment has been rendered in his favor, or in favor of his assignor, testator or intestate, upon the judgment-debtor's appearance or personal service of the summons upon him, for a sum not less than twenty-five dollars. The affidavit should state in whose favor, and against whom the judgment was rendered, and the name of the court in which the judgment was taken. It must set forth that the judgment has been docketed and in what county the judgment-roll is filed and the judgment docketed. *Hawes v. Barr*, 7 Robt. 452. It must either state the amount of the judgment, or that it was rendered for a sum not less than twenty five dollars. Code, § 2458. It must also state the amount then due on the judgment. *Douglass v. Mainzer*, 40 Hun, 75. It must truly describe the judgment, and this is not waived by the party. *Kennedy v. Weed*, 10 Abb. 62. It must contain a clear statement that the judgment-debtor is a resident of the county to which the execution was issued. If he has a place for the transaction of business in person, in the county, and the application is upon that ground, that fact should be positively alleged. If he both reside and have such place of business in the county to which the execution was issued, that fact may be properly alleged in the conjunctive, but a disjunctive statement that the judgment-debtor is a resident of or has a place for the transaction of business in the county is not proper. *Arnot v. Wright*, 29 N. Y. St. Rep. 425. Thus we see that it will not do to allege residence, or place of business and non-

residence in the alternative; as, for instance, that the debtor resided in the county where the proceedings are commenced, or is a non-resident.

An affidavit stating that a third person has property of the judgment-debtor or is indebted to him, is insufficient to authorize the granting of a third-party order, the affidavit must state the facts upon which the affiant bases his allegation that the party to be examined either had property of the debtor, or was indebted to him. An allegation in the words of section 2441 of the Code is wholly insufficient. *Collins v. Beebe*, 27 N. Y. St. Rep. 4. So an affidavit alleging upon information and belief that a third party has property of the judgment-debtor in his hands, or is indebted to him, without giving the sources of such information, is insufficient to support an order for the examination of such person. *Fleming v. Tourgee*, 40 id. 705; 16 N. Y. Supp. 2; *Leonard v. Bowman*, 15 id. 135; 40 N. Y. St. Rep. 135. The affidavit should also show that ten years have not elapsed since the return of the first execution issued upon the judgment. *Baumler v. Ackerman*, 63 Hun, 40; 43 N. Y. St. Rep. 87; 17 N. Y. Supp. 436; *McGuire v. Hudson*, 16 id. 392; 11 N. Y. St. Rep. 295. It must also show that the execution on which the proceeding is based has been issued to the county where the judgment-debtor resides. In *Schenck v. Erwin*, 38 N. Y. St. Rep. 604, the court say: "The affidavit did not show that the execution described therein had been delivered to the sheriff of the county where the judgment-debtor resided at the time the affidavit was made and the proceeding commenced. This was required by the provisions of section 2458 of the Code. It does not say to the county where the judgment-debtor resided at the time the execution was issued, but the county where he resides at the time of the commencement of the special proceedings. In the above case the judgment-debtor removed from the county after return of execution and before application was made for the order, and it was held that the proceedings could not be maintained. The affidavit need not allege that the justice by whom the judgment was rendered had jurisdiction, and an affidavit alleging that the judgment was recovered in a justice's court in the town of M., before W. C. Shumway, justice of the peace, is sufficient.

Kress v. Morehead, 8 N. Y. St. Rep. 320. The affidavit need not state that the execution was issued out of a court of record, when it shows that the judgment was one of a court of record, or where it shows that a transcript of an inferior court was filed with the clerk of the county where the judgment was rendered, and that the execution was issued by the county clerk of the county where the transcript is filed. *Joyce v. Spafard*, 9 Civ. Pro. Rep. 340. But an allegation that execution upon a justice's judgment was issued out of a county court is sufficient, since such an execution is unauthorized. *Merritt v. Judd*, 9 N. Y. Supp. 491; but see *People v. Oliver*, 66 Barb. 570. While the affidavit should state that the judgment had been docketed, and that the transcript was filed before the execution was issued, where the affidavit states that the execution was issued on the same day that the transcript was filed it will be presumed that the execution was issued after the filing of the transcript. *Webster v. Sawens*, 3 How. N. S. 320. And the affidavit is not defective in not stating that the judgment was docketed where obtained. The plaintiff having filed his judgment-roll, it will be presumed that the clerk did his duty. *Ludlow v. Meade*, 21 N. Y. St. Rep. 435. Where the proceedings are predicated upon a judgment rendered in a court not of record, the affidavit should allege that the transcript thereof was duly filed with the clerk of the county within six years after its rendition. *Davidson v. Horn*, 47 Hun, 51. If the judgment-roll is used as part of the moving papers on an application for an order, the affidavit need not state that the judgment was recovered upon the personal service of the summons on the defendant, or upon his appearance, this appearing sufficiently by the judgment-roll, which proves itself. *Sayer v. McDonald*, 2 How. N. S. 119. If it was necessary to file a transcript in a county clerk's office, the time and place of filing it should be set forth in the affidavit. The date of issuing the execution should be given, or it should be alleged to have been issued after the judgment was docketed in the same county, and where more than five years have elapsed since the recovery of the judgment, that it was issued within that time, or by leave of court. It need not allege that the judgment-debtor has property. In alleging the different facts to give

the judge jurisdiction to grant an order, the affidavit, like a pleading, should state that the judgment was duly rendered, that the transcript was duly filed, that the judgment was duly docketed, that the execution was duly issued; that the execution was duly returned, etc. Where the sheriff is a judgment-debtor, the affidavit for an order for his examination need not contain all the matters requisite to an affidavit for the examination of ordinary judgment-debtors. *Potts v. Davidson*, 1 How. N. S. 216. It should, however, allege that the judgment-debtor was, at the time of issuing the affidavit, sheriff of the county to which the execution was directed, and that the execution was therefore issued to the coroner of said county, or to a person designated to execute the said execution by an order of the court.

5 For second or subsequent orders.—A judgment-debtor is not permitted to harass his debtor by successive examinations in supplementary proceedings. After one examination the question whether he shall have the right to a second order rests in the sound discretion of the court, and the affidavit upon which the application is based should show ground for the second order in addition to those prescribed by rule 25 of the supreme court, such as subsequently acquired property, the issuing and return of an alias execution, facts newly learned or the like. *Grocer's Bank v. Bayaud*, 21 Hun, 203; *Jurgenson v. Hamilton*, 5 Abb. N. C. 149. The rule is the same if the second application is founded upon another judgment. *Canavan v. McAndrew*, 20 Hun, 46. But the issuing of such second order without proof of a new state of facts is not jurisdictional, and on a motion to set aside an order for the second examination it is not improper for the judgment-creditor to show more strongly than appeared on the ex parte application that the proceedings were not taken to harass the defendant, but with good reason. *Marshall v. Link*, 20 Civ. Pro. Rep. 109. Where the affidavit shows that the first examination was set aside or vacated on some technical objection before the proceedings were finished, it is not necessary to show farther additional reasons than those necessary on the original application. *Methodist B. C. & Co. v. Hudson*, 1 How. N. S. 517. But when the first proceedings were consummated or abandoned a second order should not be granted

unless the moving affidavits show new facts justifying another examination. *Irwin v. Chambers*, 40 N. Y. Supr. Ct. 432; *Hamilton v. Morange*, 2 Law Bull. 58; *Carter v. Clark*, 7 Robt. 43. In *Rallings v. Pittman*, 49 Supr. Ct. 307, it was held that an affidavit which stated "That the defendant hath been, at divers times heretofore, examined under orders supplementary, previously granted, and no property discovered, but that since the last examination the defendant hath become possessed of certain personal property," did not show sufficient reason for an order for further examination. It seems that a second order may be obtained while the first order is pending, upon proof that the judgment-debtor has, since the first order was issued, obtained property, and such second order does not have the effect of superseding the first order. *Walter v. Pecan*, 32 N. Y. St. Rep. 841.

CHAPTER VI.

I. ORDER FOR JUDGMENT-DEBTOR TO
APPEAR AFTER RETURN OF EX-
ECUTION.

1. In general.
2. Second and subsequent orders.
3. Reference.

II. INJUNCTION ORDER.

4. In general.

5. Exempt property—Effect of in-
junction upon.

6. Property acquired after service
of order.

7. From what it restrains.

8. No violation.

I. ORDER FOR JUDGMENT-DEBTOR TO APPEAR AFTER RE-
TURN OF EXECUTION.

1. **In general.**—The order is *ex parte* and made at chambers. These proceedings are special proceedings and are to be entitled as such, not as in the court in which judgment was rendered or into which it was docketed from an inferior court, and other persons than those in the judgment may be named as parties thereto. *Millikin v. Thomson*, 8 N. Y. St. Rep. 106; *Lynch v. Riley*, 22 Week. Dig. 357. Although it is held in *Day v. Brosnan*, 6 Abb. N. C. 312, that the order must state all the facts necessary to confer jurisdiction, otherwise it is irregular, although the affidavit states them. The contrary is held in *People v. Oliver*, 66 Barb. 570. It seems that it would be the safer practice to state in the order all the facts necessary to confer jurisdiction. It is usual for an order for examination of the judgment-debtor to combine the provisions of sections 2435, 2442 and 2451 of the Code of Civil Procedure. Section 2442 prescribes that the order must require the judgment-debtor or third person to attend and be examined, either before the judge to whom the order is returnable, or before a referee designated therein. This seems to render obsolete the case of *Lewis v. Penfield*, 39 How. Pr. 490. It seems that an order appointing a referee to take the examination of the judgment-debtor may omit to name the time and place for his appearance and direct the debtor to appear at such times and places as may be duly appointed by the referee. In such case the referee may issue his summons for the debtor to appear before him, and the debtor will be guilty of contempt if he fails to obey such summons. *Redmond v.*

Goldsmith, 2 Law Bull. 19. Section 2442 prescribes that the order must require the person to appear before the judge to whom the order is returnable, and section 2462 provides, that section 26, 52 and 279 apply to these proceedings, and the judge before whom it is continued is deemed to be the judge to whom an order or warrant is returnable.

Section 26 provides for proceedings instituted in New York and Kings counties. *Dresser v. Van Pelt*, 15 How. Pr. 19, and section 52 provides for a case of disability of a judge before whom a proceeding has been instituted, and section 279 refers to proceedings instituted before a judge of the superior court of Buffalo or the city court of Brooklyn. Section 2434 prescribes that where the order is made by a justice of the supreme court, who does not reside in the judicial district, embracing the county to which the execution was issued, the order made or warrant issued by him must be returnable to a justice of the supreme court, residing in that district, or the county judge, or the special county judge, or the special surrogate of that or an adjoining county, as directed in the order or warrant. In connection with the above, section 2459 prescribes that a resident of the state or one having an office within the state, for the regular transaction of business in person, cannot be compelled to attend, without the county where his residence or place of business is situated. Then we have the case of *Hatch v. Weyburn*, 8 How. Pr. 163, holding that the order must require the person to appear before the judge granting it in the first place, and the case of *Bank for Savings v. Hope*, 8 Daly, 316, holding that the order may require the person to appear before some other judge at chambers, specifying the time and place.

It seems that a non-resident of the state, who has no place of business therein, for the transaction of business in person, can only be examined in the county in which the judgment-roll is filed, or, in case of a judgment of a court not of record, where the judgment was rendered and transcript filed. *Anway v. David*, 9 Hun, 297. It seems that the order may be served upon the judgment-debtor in any part of the state. The order must, except in the case of an order of reference, require the debtor to appear in person before the judge to whom it is returnable, or the referee

named in it, at a specified day or hour, and at a place within the proper county, and submit to an examination concerning his property. *Hatch v. Weyburn*, 8 How. 163; *Kelty v. Yerby*, 31 id. 95.

Where the order is made returnable to a judge, other than the one signing the order, it should name the judge and the time and place for appearance, otherwise it will be defective. *Shults v. Andrews*, 54 id. 376. The order of reference for the examination of a person indebted to the judgment-debtor made by a judge of the county where the judgment-debtor resided, if that is the county where the execution was returned, may be executed in any county in the state where such third person resides or has a place of business. In *Peck v. Baldwin*, 58 Hun, 308, the court say: "That the last phrase of section 2434 is applicable to a proceeding instituted before a justice of the supreme court, where the execution has been issued out of that court, and are not confined in their operations to proceedings instituted before such a justice where the execution has been issued out of another court."

Where the facts disclosed by the proofs of the creditor are not such as to make a case within the statute, the judge acquires no jurisdiction over the subject matter. *Sackett v. Newton*, 10 How. Pr. 560. If the judgment when rendered was for a sum not less than twenty-five dollars, proceedings are maintainable if anything remains unpaid on the judgment. *Austin v. Byrnes*, 12 Civ. Pro. Rep. 332. Where the judgment was rendered in an inferior court not of record, it must appear that the execution was issued by the county clerk. *Gray v. Lieben*, 8 id. 48.

An execution returned unsatisfied on a judgment against a partnership, where the summons was served upon but one of the partners, is sufficient exhaustion of remedy at law, entitling the judgment-creditor to an order. *Perking v. Kendall*, 3 id. 240. The issuing of a second execution, after the commencement of the proceedings, is no objection to the proceedings. *Sale v. Lawson*, 4 Sandf. 718; *Steinhardt v. Michalda*, 15 Civ. Pro. Rep. 323. But if a levy is made under the second execution, upon property of the judgment-debtor, it suspends the other remedies of the judgment-creditor until a return is made by the sheriff. A discharge

in bankruptcy is a bar to supplementary proceedings. *Leo v. Joseph*, 9 N. Y. Supp. 612; *Smith v. Paul*, 20 How. Pr. 97; *World Co. v. Brooks*, 7 Abb. N. S. 212.

The judgment-creditor cannot have two orders for the examination of his judgment-debtor pending at the same time. *Gaylord v. Jones*, 7 Hun, 480; *Brockway v. Brien*, 37 How. Pr. 270; *Crowell v. Spofford*, 4 Civ. Pro. Rep. 273. The first proceeding must be terminated by order or otherwise before new proceedings can be instituted. *Krihen v. Shipherd*, 16 id. 183. But it is not absolutely necessary that an order terminating them shall be filed. *Shults v. Andrews*, 54 How. Pr. 380.

2. **Second and subsequent orders.**—A judgment-creditor is not permitted to harrass his debtor by successive examinations; after one examination the question whether he shall have the second rests in the sound discretion of the court, and the affidavit for a second order should show grounds therefor, such as subsequently acquired property. *Canavan v. McAndrew*, 20 Hun, 46; *Grocers' Bank v. Bayard*, 21 id. 203. But such order will be granted where the judgment-debtor has, since the first order was granted, come into possession of property which could not be reached on the former proceedings. *Marshall v. Link*, 36 N. Y. St. Rep. 60. After proceedings have been abandoned or withdrawn, a second order may be obtained; but if an examination was had on the first order, it must be shown that some facts exist which call for a new examination. *Sellig v. McIntyre*, 5 Law Bull. 69. Where a judgment-debtor was examined under an order which was set aside or vacated on some technical objection before the proceedings were concluded, a further examination upon the same or another judgment cannot be considered as a second examination. *Methodist B. C. & Co. v. Hudson*, 1 How. N. S. 517. The second order may be granted *ex parte*, but not unless the affidavit upon which it is applied for mentions the previous proceeding, and what became of it, and also that the debtor has since acquired property. *Goodall v. Demarest*, 2 Hilt 534.

3. **Reference.**—The order may designate a referee and require the judgment-debtor or third person to attend and be examined before such referee. Code, § 2442. So the judge to whom the order is returnable may, at any stage of the

proceedings, make an order directing that any other examination or testimony be taken by, or that a question arising thereon be referred to, a referee designated in the order. Code, § 2443. This last section does not apply to an order of reference to examine the debtor or witnesses in the proceeding, but applies only to incidental questions of fact arising at any stage of the proceedings, before a judge to whom the order is returnable. *Howe v. Welch*, 11 Civ. Pro. Rep. 445. A referee appointed in these proceedings, like a referee in an action, must not have an office with the judgment-creditors' attorney. *Gilbert v. Frothingham*, 13 Civ. Pro. Rep. 288. In an order of reference to take the examination of the judgment-debtor, it is not necessary to name the time and place for his appearance, but it is sufficient if it directs the debtor to appear at such times and places as may be duly appointed by the referee; and the debtor will be guilty of contempt if he fails to obey a summons for his appearance issued by the referee and served upon him. *Redmond v. Goldsmith*, 2 Law Bull. 19. Where the examination is taken before a referee, he must certify to the judge to whom the order is returnable, all the evidence and other proceedings taken before him. Code, § 2442.

A referee may issue a subpoena requiring a third person to appear before him and testify as a witness, and the refusal of such witness to be sworn or to testify before the referee is a contempt. *Howe v. Welch*, 11 Civ. Pro. Rep. 444.

II. INJUNCTION ORDER.

4. *In general.*—The judge granting an order or warrant or to whom it is returnable, may, with such order or warrant, and upon the same papers or afterwards upon proper proof, make an injunction order restraining any person from making or suffering any transfer or other disposition of, or interference with, the property of the judgment-debtor, until farther directions in the premises. Code, § 2451. An order appointing a receiver is a further direction in the premises, and supersedes the order of injunction. *People v. Randall*, 73 N. Y. 416 ; *Morris v. First Nat. Bank*, 68 id. 362. The injunction served in due form continues in force until the proceedings are terminated.

The failure of the judge or referee to be present at the

appointed time and place of the examination does not revoke the injunction, unless the proceedings are thereby vacated. *Reynolds v. McElhone*, 20 How. Pr. 454; *Allen v. Starring*, 26 id. 57. Any omission which discontinues the proceedings dissolves the injunction. Where the proceedings are restored the injunction is also revived. It relates back and binds the enjoined from the beginning, and over the hiatus, as if there had been no interruption.

5. Exempt property—Effect of injunction upon.—While section 2451 of the Code prescribes that “The injunction may restrain any person or corporation, whether a party or not to the proceeding, from making any transfer or other disposition of, or interference with the property of the judgment-debtor, or the property or debts concerning which any person is required to attend and be examined. Section 2463 prescribes that such injunction shall not restrain the judgment debtor from dealing with any property which is expressly exempt by law from levy and sale by virtue of an execution, or the income of property held in trust, where the fund proceeded from a person other than the judgment-debtor, or the earnings of the judgment-debtor for his personal services rendered within sixty days next before the institution of the proceedings. It also provides that in order to exempt such earnings, it must be made to appear that they are necessary for the use of a family supported by the judgment-debtor’s labor, in whole or in part. In *Hancock v. Sears*, 93 N. Y. 79, the court held that it was not necessary for the debtor to bring the facts constituting exemption to the attention of the judge or court, before applying his earnings to relieve the necessities of his family. When the judgment-debtor is a woman she has, by section 1392, the same exemptions as a householder has under sections 1390 and 1391 of the Code. The court, in the *Kneettle* case, 22 N. Y. 249, held that the householder cannot, in advance, even waive the right of exemption, as it is for the benefit of the family for which he provides.

It has also been held that the necessary wearing apparel and a cheap watch of an unmarried man is exempt. *Matter of Edlunds*, 35 Hun, 367. But see *Fink v. Freankle*, 39 N. Y. St. Rep. 194; 20 Civ. Pro. Rep. 404. A wife’s life insurance money on the life of her husband is exempt. *Baron*

v. Brummer, 100 N. Y. 372. So is a judgment recovered by a debtor against his creditor for an unlawful sale of exempt property. *Tillotson v. Wolcott*, 48 N. Y. 188.

Alimony awarded to a wife is not the wife's property nor her separate estate, and can only be charged with a debt contracted for necessities. *Romain v. Chauncey*, 39 N. Y. St. Rep. 480 ; 60 Hun, 477. So the income of a trust fund, of a trust created for the support of a man, extends to the support of the family of the man. *Thompson v. Thompson*, 52 id. 456. The term "personal services," in section 2463, includes earnings derived from a business conducted by the judgment-debtor, where his services are the chief factor in it. *McSkiman v. Knowlton*, 20 Civ. Pro. Rep. 274. So are the net proceeds of a business carried on by him with the assistance of others. *Sanford v. Goodwin*, id. 276.

While it was held in *McGivney v. Childs*, 41 Hun, 607, that the proceeds of sale of exempt property are not affected by an order forbidding a debtor from disposing of his property, it was held in *Gillett v. Hilton*, 11 Civ. Pro. Rep. 108, that a judgment-debtor cannot use money he receives for his personal services for the sixty days before the order is served upon him to pay a debt for money borrowed for and used in the support of his family. But in *Miller v. Hooper*, 19 Hun, 394, it was held that the judgment-debtor had a right to use such personal earnings as he chose. Pension money of any kind is exempt. *Sargent v. Bennett*, 3 How. N. S. 515. So is a fund created by officials of a club for the relief of a fellow-member. *Wilder v. Clark*, 33 N. Y. St. Rep. 143.

6. Property acquired after service of order.—The property mentioned in the Code of Civil Procedure is that which the debtor has when the order is made, and not such as he afterwards acquires. *McGivney v. Childs*, 41 Hun, 607; *Potter v. Low*, 16 How. Br. 549, nor a debt subsequently to become due on a contingency, or for a work to be performed. *Sands v. Roberts*, 8 Abb. 343; *Caton v. Southwell*, 13 Barb. 335. Nor property received between the making and the service of the order. *Atkinson v. Sewine*, 11 Abb. N. S. 384. Earnings received or becoming due after the service of the injunction order are not within its prohibition, *Gerregain v. Wheelwright*, 3 Abb. N. S. 265.

No court has power to anticipate the earnings of a debtor, or to direct him to appropriate future earnings to the payment of a judgment. *Columbia Institute v. Cregan*, 3 N. Y. St. Rep. 287; 11 Civ. Pro. Rep. 87. An order obtained on the last day of the month will not reach the month's salary only due at the expiration of that day. *First Nat. Bank v. Beardsley*, 8 Week. Dig. 7.

7. From what it restrains.—A judgment-debtor who has been served in supplementary proceedings with an injunction order is guilty of contempt when he, during the pendency of such proceedings, deposits money in a bank and then checks it out, although such money was loaned him for the purpose of paying the same to his creditors. *Rainford v. Temple*, 51 N. Y. St. Rep. 144. So if he transfers any property to employ an attorney. *Deposit Nat. Bank v. Wickham*, 44 How. Pr. 421. So one who does business for his wife, and has money deposited in trust for her in his own name, cannot draw out and apply it to his own use or that of his family. *People v. Kingsland*, 3 Keyes, 325. So a judgment-debtor has no right to transfer a cause of action which he has as administrator for damages for the death of his son. *Wynkoop v. Myers*, 26 N. Y. St. Rep. 81. So also the judgment-debtor violates the injunction order by any active interference with the property, either in person or by agent, for the purpose of having the legal title to the same transferred to another, thereby to deprive the judgment-creditor of the equitable lien which he has acquired therein by the service of the order.

8. No violation.—It is no violation of the injunction for the judgment-debtor to proceed to judgment in a suit pending at the time he is enjoined. *Parker v. Wakeman*, 10 Paige, 485, nor is the confessing a judgment or procuring a novation carrying into effect a previous assignment of a right of action. *McCredie v. Senior*, 4 id. 378; *Ireland v. Smith*, 3 How. Pr. 244, nor the giving of a new mortgage in lieu of one already on the property, (*Duffus v. Cole*, 15 N. Y. Supp. 370), nor the bringing of a suit for a personal tort which cannot be assigned, nor where the debtor has sold or assigned a claim to another in good faith to sign all necessary papers to carry out such contract.

CHAPTER VII.

I. MAKING AND SERVICE OF ORDER.

1. By whom order may be made—
In general.
2. Contempt proceedings.
3. Supreme court justice.
4. County judge, special county judge, and special surrogate.
5. Marine recorder and superior court judges.

6. Continuation of proceedings before different judges.

II. SERVICE OF ORDER.

1. Where served.
2. How served.
3. When to be served.
4. A party or witness attending court.
5. Waiver of service.

I. MAKING AND SERVICE OF ORDER.

1. **By whom order may be made—In general.**—Supplementary proceedings proper can only be had before a judge out of court as a separate judicial officer. Thus in *Douglas v. Manizer*, 40 Hun, 75, the court say: "Jurisdiction to make an order requiring a debtor to appear before a referee and be examined in supplementary proceedings is given by the Code to a judge and not to any court." It was held at general term in the above case that the court had no power to direct a judgment-debtor to appear and be examined, even where such order was made upon denying a motion made by such judgment-debtor to vacate the original order made by a judge for want of prosecution and where the time fixed by the original order for the examination had passed.

2. **Contempt proceedings.**—Proceedings for contempt are themselves special proceedings, independent of the action or special proceeding in which they may be taken, and an order made therein cannot be regarded as an order made in the course of the original proceedings. *Moschell v. Boor*, 50 N. Y. St. Rep. 238; *People ex rel, Grant v. Warner*, 20 id. 573. Such proceedings may be instituted before the court or the judge before whom the proceedings in supplementary proceedings were instituted.

3. **Supreme court justice.**—Section 2434 of the Code of Civil Procedure, in effect, provides that either of the special proceedings mentioned in section 2432 may be instituted before a judge of the court out of which the execution issued, which includes a justice of the supreme court where

the execution was issued out of that court. *Baldwin v. Perry*, 25 Hun, 72. It then provides that where the execution is issued out of a court other than the supreme court, and the judges thereof are absent or disqualified, such special proceedings may be instituted before a justice of the supreme court. Then follows this provision: "In that case if he does not reside within the judicial district embracing the county to which the execution was issued, the order made * * * by him must be returnable to a justice of the supreme court residing in that district, or the county judge or special county judge or special surrogate of that or an adjoining county, as directed in the order."

The above provisions are applicable where the execution has been issued out of the supreme court, as well as where an execution has been issued out of another court. *Peck v. Baldwin*, 34 N.Y. St. Rep. 511, 515. In *Browning v. Hayes*, 1 id. 502, this question was before the general term, where it was held that the words "in that case," in section 2434, did not alone refer to orders made by inferior judges. It is true that Judge Vann, at special term, held otherwise. *Blanchard v. Reilly*, 11 Civ. Pro. Rep. 279. Thus it will be seen that any supreme court justice may entertain these proceedings without regard to his own residence or location. But the debtor must be directed to appear in the county where he resides or has a place of business. *Bingham v. Disbrow*, 37 Barb. 24; *Jacobson v. Doty Plaster Mfg. Co.*, 32 Hun, 436.

4. County judge, special county judge and special surrogate.—Any county judge, special county judge or special surrogate may entertain the proceeding within his county, on any judgment in which the execution thereon was issued to his county. *Terry v. Hultz*, 39 How. Pr. 169. This includes judgments rendered by a justice of the peace, or in a justice's court of a city within his county, and docketed with the clerk of the county, and on a judgment of any other local court in the state, which has been docketed in his county, whether such court is situated there or not.

5. Marine recorders and superior judges.—The marine court judges have, in respect to judgments recovered in that court, all the power of a judge of the supreme court at chambers. *Holbrook v. Orgler*, 40 N. Y. Supr. 33.

The surrogate of Steuben county, the recorder of the city of Oswego, and the recorder of the city of Troy may entertain the proceedings within their respective counties, where the execution was issued to the sheriff of their county. *McIntyre v. Allen*, 43 Hun, 124. A judge of the city court of Brooklyn may entertain these proceedings within his city on a judgment in his own court. So may the judge of any court of record.

6. Continuation of proceedings before different judges.—While it is a rule, that the jurisdiction of a judge once acquired is conclusive, and continues until the examination is completed, and all orders made in respect to the property of the judgment-debtor or otherwise is fully executed. *Webber v. Hobbie*, 13 How. Pr. 382. Sections 25, 52 and 279 of the Code apply to these proceedings, and the judge before whom it is continued as prescribed in either of those sections, is deemed to be the judge to whom an order or warrant is returnable for the purpose of any of these proceedings Code, § 2462, and where a judge, before whom these proceedings are pending, goes out of office, they may be continued before his successor. *Holstein v. Rice*, 24 How. Pr. 135. For a special proceeding does not abate by any event, if the right sought in such special proceeding survives and continues. Code, § 755.

II. SERVICE OF ORDER.

1. Where served.—These proceedings are special proceedings, either in or independent of the action, and the order for examination is a process like a summons by which an action is commenced.

It was held in the case of *Wegman v. Childs*, 41 N. Y. 159, that an action was pending in the court wherein it was brought, until after the satisfaction of the judgment therein.

The court in *Wright v. Nostrand et al.*, 94 N. Y. 45, say: "It was said in *Underwood v. Sutcliffe*, 10 Hun, 453, that such proceedings were in the nature of an action, and although this may be so in some respects, it would seem to conform more with the meaning and intent of the statute to hold that they are in the nature of new remedies or equitable rights, arising by force of the statute, in the actions in

which the judgment was obtained. Section 347 of the Code provides that a county court has power in an action or special proceeding, in which it has jurisdiction, to send its process and other mandates into any county in the state for service or execution, and to enforce obedience thereto with like power and authority as the supreme court; and section 349 provides that the county judge,—which includes the special county judge,—and special surrogate when acting at chambers,—possesses the same power and authority in a special proceeding out of court which a justice of the supreme court possesses in a like special proceeding. If the order is made by a supreme court justice, it may be served in any county of the state. *Bingham v. Disbrow*, 37 Barb. 24. Again we find that section 268 of the Code prescribes that each judge of a superior city court possesses the same power and authority in a special proceeding which can be lawfully instituted before him out of court, which a justice of the supreme court possesses in a like proceeding. Whether or not the order of a local officer, as a recorder of the city of Oswego, can be served outside the territorial jurisdiction of his court does not seem to have been settled by any decided case.

But it seems the order may be served anywhere in the state, provided such facts are shown as to give the judge jurisdiction of the person of the judgment-debtor and of the subject-matter. *Varick v. Dodge*, 9 Paige, 149, as the judge acts, not as an officer of his court, but as a separate and independent tribunal. *Webber v. Hobbie*, 13 How. Pr. 382. In *Corrall v. Langan*, 44 N. Y. St. Rep. 224, the court say: "The power conferred on the recorder of the city of Albany to act in proceedings supplementary to execution, is a power to be exercised only within that city." In that case the recorder attempted to compel a resident of Albany county to appear and be examined in Rensselaer county; however the opinion of the court throws doubt upon the jurisdiction of local courts, and is important as an authority.

8. How served.—Section 2452 of the Code provides that an injunction order, or an order requiring a person to attend and be examined, must be served as follows: 1. The original order, under the hand of the judge making it, must be exhibited to the person to be served. 2. A copy thereof,

and of the affidavit upon which it was made, must be delivered to him. Service upon a corporation must be made by service of the order on an officer thereof on whom a summons may be served. The affidavit upon which the order is founded must be served with it ; a service of the order without the affidavit is a nullity. The order can be served by any person.

The sheriff's certificate of the service of such an order is not proof of service thereof. *Utica City Bank v. Buell*, 17 How. Pr. 498. There seems to be only two classes of cases where the certificate of an officer is evidence of the facts stated in it, and upon which some future action can be predicated. The first is where it is made evidence by statute, and the second when what is technically known as process or that which is in the nature of process, is directed to the sheriff and he is required or directed to make a return thereto.

In reference to orders of arrest of attachments and executions, they are all directed to the sheriff, and require him to execute the same according to law. But if the process is silent as to a return, the duty of the sheriff is doubtless the same, and whenever such duty is enjoined by the process or by the law, the return is an official act and becomes evidence by the common law. 1 Greenl. Ev., § 498. The statute in relation to the duties of a sheriff requires every sheriff or other officer to whom process shall be delivered, to execute the same according to the command thereof, and to make due return of his proceedings thereon. Which return shall be signed by him. 2 R. S. (3d ed.) 535, § 95:

If the order is process it seems that the certificate of the sheriff would be sufficient proof of its service.

Process is defined by Blackstone to be the means of compelling a defendant to appear in court; it is known as *mesne* and *final*, which are used to designate the two stages in the process of a cause in which it is employed.

Process is always directed to some officer to be executed, and is strictly the mandate of the court to the officer commanding him to do certain things or perform certain services within his official cognizance, and it is this character of it, and the injunctions it contains, which makes its return evidence. To ascertain then whether a return is

competent evidence or not we must look to the process itself, primarily, and to the law regulating the duty of officers thereon."

If the process is not what is called returnable process, or, in other words, if it be process upon which the officer is not required to certify his doings, his return will not be evidence except where such certificate is expressly made evidence by statute. Section 102 of the Code provides for a return to a mandate, and section 433 provides that the provisions of art. I, title I, of chapter V, relating to the mode of service of a summons, apply likewise to the service of a process or other paper, whereby a special proceeding is commenced, except a proceeding to punish for contempt, and except where special provision for the service thereof is otherwise made by law. Then follows subd. 1, of section 434 in the following words: "If the service was made by the sheriff it may be proved by his certificate thereof." This section was substituted for all of Code of Pro. § 138, and does not change the rule laid down in *Utica City Bank v. Buell*.

I find nothing in the Code except section 434 that makes a return when made evidence of the facts stated therein. These proceedings are excepted by section 433. The Code, therefore, is silent as to the mode of service of orders in these proceedings. This examination satisfies me that the certificate of the service of these orders is not sufficient as evidence that service has been made. Without personal service of the order in the manner prescribed by the above section before the time of the return thereof, no jurisdiction is acquired over the person of the judgment-debtor, and all right to proceed in the matter is gone. *People v. Warner*, 51 Hun, 53; 20 N. Y. St. Rep. 573. But it is different as to any order in the proceeding after the due service of the order for examination. *Johnson v. Suttle*, 17 Abb. 315.

9. **When to be served.**—The practice is not yet settled as to how long an order must be served before the time prescribed for its return. There is still considerable diversity of opinion in the courts as to the time a person should be allowed in which to attend his examination, but all agree that he must have a reasonable length of time.

10. A party or witness attending court.—The service of an order for the examination of a judgment-debtor may properly be made upon him while he is attending court as witness, if he is a resident of the state. *Fritcher v. Fraucks*, 21 Civ. Pro. Rep. 34. But it is different as to a non-resident party to a suit attending a trial of his action in this state. *Tribune Ass. v. Sleeman*, 12 id. 20.

11. Waiver of service.—A failure to show the party the original order, when serving him with a copy, is a mere irregularity, which is waived by appearing without objection. *Newell v. Cutler*, 19 Hun, 74. A party can unquestionably make a qualified appearance, and loses thereby no rights which he expressly reserves. But where a party appears in obedience to an order, the service has accomplished all its office, and no proof whatever is necessary on that point. The rights reserved, and which the party does not lose, are the right to oppose the proceeding and the regularity and sufficiency thereof. The omission of the judgment-creditor to subscribe the copy of an affidavit and order with his office and place of address is a mere irregularity not vitiating the service of the order, and does not authorize the judge who made the order to vacate the same upon an *ex parte* application. *Dorsey v. Cummings*, 48 Hun, 76. A judge who makes an order for examination cannot vacate it *ex parte*. *Id.*

CHAPTER VIII.

RETURN—ADJOURNMENT—CONTINUITY—EXAMINATION.

I. IN GENERAL.	V. EXAMINATION.
II. ADJOURNMENT.	1. In general.
III. DELAYS BY JUDGMENT-CREDITOR	2. Practice upon.
—EFFECT OF.	VI. CREDITOR'S RIGHT TO COMPLETE
IV. ABSENCE OF JUDGE OR REF- EREE.	EXAMINATION,
	3. Extent of injury.

I. IN GENERAL.

The party ordered to attend for examination must attend at the time and place specified in the order, or within a reasonable time after the time therein specified. Either party must wait a reasonable time in the absence of the other, before he can take default. In *Reynolds v. McElhone*, 20 How. Pr. 454, the debtor went to the judge's office at the appointed hour, but left without waiting a reasonable time for the arrival of the judge and creditor, and the court say: "That neither the proceedings nor the injunction order had been thereby revoked or become inoperative. If either party fails to appear within a reasonable time the judge or referee may enter the proceedings on his minutes, and when the proceedings are before a referee, he must make a return of the same to the judge granting the order, and the said judge or the court out of which the execution was issued may punish the defaulting party ordered to appear." It is discretionary with the judge or referee to allow an adjournment in the debtor's absence, some one being present to represent him and apply for an adjournment in his behalf. The same practice prevails in these proceedings as in case of a trial before a court or referee. But where the judgment-debtor does not appear in person, and the proceedings are adjourned upon motion of one claiming to be his attorney or agent, an order or summons directing him to appear at the time to which the proceedings are adjourned must be served upon him, in order to bring him into contempt for failure to appear on such adjourned day. Appearance means not merely bodily presence; the debtor must render himself before the officer to answer to the proceedings when

they are moved. *People v. Wilgus*, 5 Dem. 58. It is not sufficient for the debtor to be present and not answer when his name is called.

II. ADJOURNMENT.

Section 2444 of the Code provides that the judge or referee may adjourn any proceedings, from time to time, as he thinks proper. Of course the authority to adjourn should not be abused nor exercised except for good cause shown by affidavit or other proof, unless proof is waived.

Adjournments by the parties to another place is irregular.

The debtor can only be compelled to attend before the judge or referee. The proper way is to get the judge or referee to adjourn to the place agreed upon and direct the debtor or third person to appear at such place. *Squires v. Youngs*, 1 Bosw. 690.

III. DELAYS BY JUDGMENT-CREDITOR.—EFFECT OF.

Section 2454 of the Code provides that where the judgment-creditor unreasonably neglects or delays to proceed, his proceedings may be dismissed upon such terms as justice requires, by an order made upon the application of the judgment-debtor, or of the plaintiff in a judgment-creditor's action against the debtor, or of a judgment-creditor who has instituted either of the supplementary proceedings, and it seems that an abandonment of supplementary proceedings may be inferred from delay of the creditor to prosecute them, provided the delay be unreasonable. *Schauck v. Conover*, 56 How. Pr. 439; *Myers v. Herbert*, 45 N. Y. St. Rep. 626. But such proceeding will not be abandoned from a reasonable delay of a few months. *Stanley v. Lovett*, 14 Hun, 412. Where, however, the judgment-creditor designedly omits to appear upon an adjourned day, he abandons the proceedings, which will operate as a discontinuance thereof. *Squires v. Youngs*, 1 Bosw. 690. Yet the court does not lose jurisdiction of the proceedings by the mere neglect of either or both parties to appear on a day to which they have been adjourned. *Underwood v. Sutcliff*, 10 Hun, 453.

It was held in *Brockway v. Brien*, 37 How. Pr. 270, that the proceedings under an order appointing a referee, etc.,

must be finished, or some order made by the court in the proceeding, before any other order can be made in the premises. This is in accord with section 2454 of the Code, which provides for the discontinuance of these proceedings. But a contrary rule was laid down in *Schauck v. Conover*, 56 How. Pr. 437; *Gaylord v. Jones*, 7 Hun, 480; *Edmonston v. McLoud*, 16 N. Y. 543; *Thomas v. Kircher*, 15 Abb. N. S. 434; *Ballou v. Boland*, 14 Hun, 355.

It seems that the last phrase of section 2454 of the Code was adopted to settle the rule laid down in *Kennedy v. Norcott*, 54 How. Pr. 87, as to the discontinuance of these proceedings without notice to the parties interested in the matter.

IV. ABSENCE OF JUDGE OR REFEREE.

Supplementary proceedings, as regulated by the present Code of Civil Procedure is, in its nature, a new suit. It is instituted before a judge pursuant to authority given by statute, and the jurisdiction of the judge must continue until the examination is completed. Section 755 of the Code prescribes that "a special proceeding does not abate by any event, if the right sought in such special proceedings survives and continues." When the judge before whom the proceedings are instituted dies or goes out of office, the proceedings may be completed before his successor in office.

A referee appointed in these proceedings has the same power as a referee appointed in an action to take testimony. When the proceedings are complete the judge may allow to the prevailing party costs. The absence of the judge or referee at the time appointed for examination, does not terminate the proceedings any more than it would in an action. The proceedings are continued by a summons or direction of the judge or referee, to the judgment debtor or person to be examined, to appear at some other time. *Keihen v. Shipherd*, 17 Civ. Pro. Rep. 183; *Allen v. Starring*, 26 How. Pr. 59.

It is proper to appoint a referee and direct the debtor to appear before him at such time and place as may be duly appointed by the referee, without fixing any time or place for appearance and examination by the order. In such case the referee may issue his summons for the debtor to appear

before him, and a failure by the debtor to obey such summons is a contempt. *Redmend v. Goldsmith*, 2 Law Bull. 19.

Where the examination is before a referee he must sign all subpoenas for witnesses to be examined before him. *People v. Ball*, 37 Hun, 245. Section 2444 of the Code provides that either party may be examined as a witness in his own behalf, and may produce and examine other witnesses as upon the trial of an action. The injunction order is not dissolved nor its priority lost, until the proceedings are discontinued or dismissed, or until some other directions are made in the premises.

V. EXAMINATION.

1. *In general.*—Since the adoption of the Code of Civil Procedure, the examination in supplementary proceedings is somewhat similar to proceedings upon the trial of an equity action before a judge or referee, either party may be examined as a witness in his own behalf and may produce and examine other witnesses as upon the trial of an action. Code Civ. Pro., § 2444.

Each answer of a party or witness examined must be under oath; and a party or a witness is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud, or to prove that he has been a party or privy to, or knowing of, a conveyance, assignment, transfer or other disposition of property, for any purpose. But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding. *Id.*, § 2460.

2. *Practice upon.*—The examination is taken in the form of a deposition and should be signed by the witness, and filed in the county clerk's office. *Fiske v. Twigg*, 5 Civ. Pro. Rep. 41. "Each answer must be under oath." Code, § 2444. The questions and answers ought all to be written down especially when the examination is taken before a referee. The examination is generally carried on in the same manner as the taking of testimony upon the trial of an action, except the testimony of each witness must be in the form of a deposition, and kept separate from the testimony of other witnesses. When the deposition is taken

before a judge, he passes upon any questions that may arise in the course of the examination.

The witnesses, whether parties or not, are required to testify in these proceedings in the same manner as upon the trial of an issue. § 2444. The same rules are therefore applicable to the debtor and witnesses as to the extent and thoroughness of the examination. They may both be cross-examined the same as witnesses upon the trial of an issue. Either party may have counsel. The special duty of counsel is to render aid to the parties and to the court, and the privilege of counsel is accorded to parties as a right in all controversies. Weeks on Attorneys, § 184; People ex rel. v. Van Allen, 55 N. Y. 31. The judgment-debtor, upon his own examination, is entitled to have his counsel's advice in framing his answers to the questions put to him. Corning v. Tooker, 5 How. Pr. 16. While a witness is not entitled to counsel as a matter of right, it is discretionary with the court or referee to permit counsel for a witness to participate in an examination. Schwab v. Cohen, 13 N. Y. St. Rep. 709. After the examination is finished, the deposition should be read over to the witness, and he should be allowed to correct any mistakes in the deposition; such corrections should be made by way of a supplemental examination, leaving the original disposition untouched. Sherwood v. Dolan, 14 Hun, 191; Corning v. Tooker, 5 How. Pr. 16. After an order for the examination of a judgment-debtor has been duly served upon him, the creditor is not obliged to examine the debtor, but he may examine other witnesses. Where a receiver is appointed before the examination of the debtor or witnesses has been had, the appointment of a receiver does not terminate the judge's jurisdiction over the proceedings. And the examination may proceed after that the same as though such appointment had not been made. But whether or not such further proceedings can be had after the appointment of a receiver at the close of an examination, *quaere*.

It would seem from section 2444 of the Code that a party is entitled to the right of cross-examination the same as upon the trial of an issue. Whether a referee can punish a party or witness for contempt under the Code of Civil Procedure seems not to have been expressly decided, as no

reported case has been found relating to this point. But under the old practice, where a witness refuses to answer a question after being directed so to do by the referee, the referee had no power to punish the witness but certified the facts to the judge granting the order or to the court. Where a referee unjustly and arbitrarily refuses an adjournment of the proceedings the remedy of the party is by withdrawing from the examination and presenting the facts of the case to the judge or court on the application of the creditor for an attachment for contempt. *Mason v. Lee*, 23 How. Pr. 466.

VI. CREDITOR'S RIGHT TO COMPLETE EXAMINATION.

The provisions of the Code give the creditor complete authority for a full and searching examination of the judgment-debtor for the purpose of ascertaining particularly the amount and condition, as well as the disposition, the debtor has made, or attempted to make, of his property. *Seligman v. Wallach*, 67 How. Pr. 514; 6 Civ. Pro. Rep. 232; 16 Abb. N. C. 317. A party cannot evade or break off an examination by a claim that he is the owner by purchase of the property concerning which the inquiry is made. *Mechanics' and T. Bank v. Healey*, 14 Week. Dig. 120. Nor by offering to consent to the appointment of a receiver. A receiver may be appointed at any time after making an order requiring the judgment-debtor to appear, or any person to attend and be examined, or the issuing of a warrant upon two days' notice to the judgment-debtor (Code, § 2464), and the examination may proceed the same as though no receiver had been appointed. The appointment of a receiver sheds no light upon the dark places in which the debtor has concealed his property. It is a common practice for a dishonest debtor to take refuge behind a friendly receivership.

The extent of the inquiry in each particular case must be left to the good sense of the officer under whose direction it takes place. When a debtor has once been fully examined, and offers to produce the examination to another creditor who seeks an investigation by this means, he should not be put to the annoyance of a re-examination except upon new matter.

The discharge of the judgment-debtor in bankruptcy proceedings, if properly set up and brought to the attention of the judge, is a bar to these proceedings. *Leo v. Johnson*, 9 N. Y. Supp. 612; *Smith v. Paul*, 20 How. Pr. 97; *World Co. v. Brooks*, 7 Abb. N. S. 212. But the bringing an action to set aside an assignment does not affect the right of the creditor to prosecute supplementary proceedings against the judgment-debtor, as a judgment-creditor may take any number of remedies against his debtor, and that by so doing he makes no election, but they are all concurrent remedies. In the matter of *Sickle*, 23 N. Y. St. Rep. 585. The same rule seems to have been laid down in *Seligman v. Wallach*, 16 Abb. N. C. 317, although the note at the bottom of page 319 states the contrary. But in *Wilson Bro.'s Woodenware, etc., Co. v. Daggett*, 9 Civ. Pro. Rep. 408, it was held that where a judgment-creditor has proven his claim against the general assignee of the judgment-debtor, and thus availed himself of the assignment, he must, in supplementary proceedings afterwards instituted, be limited to after acquired property.

3. Extent of inquiry.—We have seen that the provisions of the Code is to furnish a ready substitute for the old equity proceedings in discovering and applying the property of the debtor, which cannot otherwise be reached, for the payment of his debts. *Joyce v. Spaford*, 9 Civ. Pro. Rep. 342. Section 2460 permits the creditor to examine into the character of transfers of property made by the debtor to third persons who claim under such transfer, and as to property owned by the debtor at and prior to the time of making a general assignment for the benefit of creditors, and as to the disposition made of it. *Schneider v. Altman*, 8 Civ. Pro. Rep. 242; *Seligman v. Wallach*, 6 id. 232; 67 How. Pr. 514. And any question tending to show that the witness has property of the judgment-debtor is pertinent and proper. *Hart v. Johnson*, 43 Hun, 505-508. The Code of Civil Procedure, § 2460, provides that a party or a witness * * * is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud, or to prove that he has been a party or privy to, or knowing of a conveyance, assignment, transfer or other disposition of property

for any purpose. This enactment is an innovation upon the ordinary rules of evidence, and was intended to give a more full examination than could be obtained without it, and as far as it extends must be enforced. *Gilpin v. Daly*, 36 N. Y. St. Rep. 666. The Code of Civil Procedure, § 1914, providing that an action cannot be maintained to obtain a discovery under oath, in aid of the prosecution or defense of another action, has no application to supplementary proceedings. *Dawson v. Sickie*, 5 N. Y. Supp. 703. A witness or a judgment-debtor may be compelled to produce any book or document relevant to the matter inquired into. *Champlin v. Stoddard*, 17 Week. Dig. 76; *Pruden v. Tallman*, 6 Civ. Pro. Rep. 360; *Bacon v. Frisbie*, 80 N. Y. 394. The same rule exists in these proceedings as upon the trial of an action as to the competency and relevancy of evidence except as specially enlarged by section 2460 of the Code. These proceedings are used as a substitute for the old suit for a discovery, which was taken away by section 1914 of the Code. But no particular rules can be laid down for the conduct of the examination.

CHAPTER IX.

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| I. PROCEEDINGS AFTER THE ISSUING
AND BEFORE THE RETURN OF
EXECUTION.
1. In general.
II. PROOF NECESSARY TO OBTAIN
ORDER.
2. In general.
3. Illustrations. | * 4. What kind of property.
5. Proof of refusal to apply
property.
III. ORDER OF PRACTICE THERE-
UNDER.
6. In general.
7. Examination. |
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I. PROCEEDINGS AFTER THE ISSUING AND BEFORE THE RETURN OF EXECUTION.

1. In general.—The proceedings under subdivision 2 of section 2432 and section 2436 of the Code are in aid of the execution and are not supplementary thereto. The above section provides that at any time after the issuing of an execution against property, as prescribed in section 2458, and before the return thereof, the judgment-creditor, upon proof, by affidavit or other competent written evidence, that the judgment-debtor has property, which he unjustly refuses to apply towards the satisfaction of the judgment, is entitled to an order requiring the judgment-debtor to attend and be examined concerning his property. The word property as used in this section includes real and personal property. *Mason v. Hackett*, 21 Week. Dig. 79.

Proceedings; after the issuing and before the return of an execution, may be instituted before the same judges by and against the same persons, upon the same class of judgments and upon executions issued to the same counties, and the examination must be had in the same counties, as in proceedings after the return of execution unsatisfied. Sections 2434, 2436–2458, and subd. 2 of § 2432 of the Code. So the proof to obtain the order must be by affidavit or other competent evidence; and in respect to the recovery of the judgment, the amount of the judgment, the parties, etc., the issuing of the execution, etc., the same facts must be stated as in proceedings after the return of execution. It must appear that the execution is yet in the hands of the sheriff unsatisfied.

II. PROOF NECESSARY TO OBTAIN ORDER.

2. *In general.*—The proof to obtain an order must be satisfactory to the judge on two points. That the judgment-debtor has property not exempt from execution, and that he unjustly refuses to apply it to the payment of the judgment. An affidavit upon information and belief is not sufficient to give the judge jurisdiction. The Code requires legal proof, which statements on information do not constitute. *Mankin v. Page*, 65 How. Pr. 453, but the slightest amount of such proof is enough to confer jurisdiction. The judgment creditor, in order to be entitled to an order under section 2436 of the Code, must show that a demand had been made upon the judgment-debtor, for the application of the property in payment of his judgment, and a neglect or refusal by the judgment-debtor to so apply it. *Levy v. Beacham*, 18 N. Y. Supp. 748. Where the proof fails to show such facts, the order will be vacated. *Bowery Bank v. Widnayer*, 9 id. 629. The proof must also show that the execution was issued within the five years allowed by section 1375 or, if after the expiration of five years, that an execution had been issued within that time, or that the present execution was issued pursuant to the order of the court granted under sec. 1377. *Hutson v. Weld*, 38 Hun, 142.

The affidavit must also show that the judgment-debtor is a resident of the county to which the execution was issued (*Arnot v. Wright*, 29 N. Y. St. Rep. 425), or had a place for the transaction of business in person in the county. The affidavit should also show, when the judgment was rendered by a court not of record, that the execution was issued by a county clerk as required by section 3017 of the Code.

The proof must also show that the transcript was duly filed in the county clerk's office within six years after the judgment was rendered.

3. *Illustrations.*—In *Levy v. Beacham*, 46 N. Y. St. Rep. 51, the court say: "Section 2436 of the Code requires that in order to obtain an order requiring the judgment-debtor to be examined concerning his property in aid of the execution, the judgment-creditor must prove to the court that the judgment-debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment.

Such proof must show that a demand of the application of the property to the payment of the judgment has been made, otherwise no refusal can be established." In *First Nat. Bank of Rome v. Wilson*, 13 Hun, 232, the affidavit on that point stated that the judgment-debtor "has property and rights in action consisting of mortgages and other choses in action, which are not subject to levy and sale on execution, which he unjustly refuses to apply toward the satisfaction of said judgment." In that case the court say: "The language of the affidavit on that subject is a transcript of the statute. It states a conclusion merely, and not facts. We are of the opinion that in proceedings under this statute, the proof made on the application for the order should show facts and circumstances, in order that the judge may decide whether there has been an unjust refusal. The defect, however, is not jurisdictional. The averment, in the language of the statute, is enough to give jurisdiction. The defect is an irregularity which may be waived or amended. In this case it was amended by the affidavits read on the part of the respondent in opposition to the motion. Those affidavits allege a demand and refusal. That, we think, is enough, in view of the literal construction required to be given to the provision of the Code." In *Hutson v. Weld*, 38 id. 143, the court say: "There can be no doubt that the affidavit is defective. It is so because it does not appear that the execution outstanding was issued within five years allowed by the statute for that purpose after judgment (Code, § 1375), or, if after the expiration of the five years, under such circumstances as justified that ceremony, namely, that an execution had been issued within five years after the entry of the judgment, and had been returned wholly or partly unsatisfied, or unexecuted, or an order of the court granting leave to issue the execution, after the expiration of five years. And it cannot well be doubted either that the affidavit was deficient in failing to show that a demand was made of the property which it was alleged was unjustly withheld by the debtor."

4. **What kind of property.**—The proceedings authorized by section 2436 of the Code was given for the purpose of reaching such property only as was of such a nature, or so

circumstanced, that it could not be reached by execution. As to all other property, the section which requires the previous issuing of an execution contemplates that the creditors shall be confined to that remedy until the execution shall be returned, pursuant to the provisions of the section. The creditor must first issue his execution in all cases. If he fails to reach the debtor's property by that means, he may, upon the return of the execution unsatisfied, have an order requiring the debtor to submit to an examination for the purpose of discovering his property.

If, after the execution has been issued and before it has been returned, the creditor can prove, to the satisfaction of the judge, that the debtor has property not subject to levy, or which is so kept by the debtor that it cannot be clearly identified, and with ordinary diligence reached by execution, the creditor may have the same order upon which the same proceedings may be had as are given on the return of the execution. But where the debtor is shown to be in the undisputed possession of property subject to levy on execution, under circumstances affording unequivocal evidence of title, the creditor is bound to levy upon such property instead of resorting to these proceedings. *Sackett v. Newton*, 10 How. Pr. 565.

It is not property generally, as the word is defined by the Code, that can be reached by this proceeding. It must either consist of property not subject to levy, or if levyable, it must be shown to be so kept by the debtor that it cannot be clearly identified, and with ordinary diligence reached by execution, or that he fraudulently conceals it out of reach of the execution. It was held in *First Nat. Bank of Rome v. Wilson*, that the applicant must either show that the debtor has property, and specify the particular form in which it exists, or if he cannot do that, he must state the facts on which his inference is based, that the debtor has property, so that others can judge whether he reasons correctly. *People v. Recorder of Albany*, 6 Hill, 429. The proof must satisfy the court, or judge, that the property described belongs to the judgment-debtor, and is in his possession or under his control.

5: Proof of refusal to apply property.—Section 2436 of the Code makes it imperative upon the applicant for an

order of examination under that section to show that the debtor refuses to apply the property described to the satisfaction of the judgment. It must, therefore, appear that a proper demand has been made of the judgment-debtor by a person having authority to make it.

The above section of the Code is a substitute for the non-imprisonment act. In *Spear v. Wardell*, 1 N. Y. 151, the court say: "There must be an unjust refusal on the part of the debtor to apply his property that an execution cannot reach to the payment of the judgment." In *Stewart v. Biddlecome*, 2 id. 103, the attorney for the judgment-creditor caused to be presented and delivered to the judgment-debtor a written demand, signed by him as such attorney, requiring the debtor to make an assignment of his claims, notes, accounts and other property and rights in action, to apply on the judgment. It was there insisted by the judgment-debtor that there was not evidence of a sufficient demand made requiring him to apply his rights in action and the like to the payment of the judgment. But the court held that, in general, the attorney of record is authorized to make the demand, and the court say: "This proceeding has been considered as a statute execution, reaching property which is not subject to seizure by execution, and such as through fraud of the debtor either has been or is in danger of being placed beyond the reach of the ordinary process. On the question whether it was necessary to specify in the demand the particular rights in action, stock, money or evidence of debt required of the judgment-debtor to apply to the payment of the judgment, the court say: "It cannot be supposed that a creditor generally can very well have the knowledge or information of the particulars of such property which his debtor may own, and could not be thus particular if it was required."

And besides, it is enough to say that the statute, neither in its policy or language, requires such particularity.

As to whether it is necessary to show that some person was present when the demand was made, authorized to receive the property demanded or an assignment of it, the court say: "That might be a good objection if the refusal is put upon that ground." The Code is silent as to the

manner in which the application of a debtor's property under such circumstances is to be made, or who is entitled to the custody and collection of his rights in action in order to make the application. Clearly the debtor is not so entitled, and it might well be that the creditor would be a very unsafe and unfit person to be the depository of the fund. It does not necessarily follow that a debtor, in order to comply with the provisions of the Code, is bound in all cases to assign or deliver his stock and rights in action to his creditors in person.

It seems that the demand can be made by the sheriff, the judgment-creditor or his agent. The demand should be made in writing, subscribed by the party in whose favor it is made, and, if practicable, it should describe the property, and if the property mentioned is subject to levy and sale it should require the debtor to deliver it to the sheriff holding the execution. If the property demanded is not the subject of levy and sale on execution, the demand is sufficient if it requires the debtor to deliver the same to some responsible person named or to the creditor. Section 2447 of the Code provides that where it appears, from the examination or testimony taken, that the judgment-debtor has in his possession or under his control money or other personal property belonging to him, the judge may order him to deliver the same to the sheriff unless a receiver has been appointed, and in that case to the receiver.

III. ORDER AND PRACTICE THEREUNDER.

6. In general.—An order in aid of an execution is similar to that in proceedings instituted after the return of an execution, and the practice is substantially the same. Thus, proceedings commenced before one judge may be continued before another. Code Civ. Pro., § 2462. The order must be served as required by section 2452, and the proceedings must be instituted and prosecuted before a judge specified in section 2434. The order may require attendance before a referee, as prescribed by section 2442, and the judge or referee may adjourn the proceedings from time to time as prescribed by section 2444.

A warrant may issue instead of the order as prescribed by section 2437. So after an order in aid of an execution

has been served an order to examine a person having property, etc., of the judgment-debtor may be obtained under section 2441.

Notwithstanding the provisions of section 2436, the granting of an order is held to be discretionary with the judge to whom application is made. These proceedings are a substitute for an action in equity in aid of an execution. *Erickson v. Quinn*, 15 Abb. N. S. 166; *Kamp. v. Kamp*, 46 How. Pr. 143. Such an action is not a creditor's bill proper. *Roger Wheel Co. v. Feilding*, 61 How. Pr. 437.

7. Examination.—Though the Code does not prescribe any different mode of examination upon an order in aid of an execution than upon an order after the return of an execution (sections 2444 and 2460), the practice is to confine the examination to the property specified or mentioned in the affidavit, or proof on which the order was issued. The whole examination must have for its single object to ascertain whether there is any property of the debtor which ought to be applied to the payment of the creditor's claim, and the extent of the inquiry in each particular case must be left to the good sense of the officer under whose direction it takes place, having in view the general object.

In these proceedings the question is what intangible property did the judgment-debtor own or control when the demand was made? If it appears that he had such property, and unjustly refused to apply it upon the judgment when asked to do so, the judge will make an order under section 2449 for the delivery of the property, and the prosecuting creditor, by making the demand, acquires a right of preference to the property demanded. *Duffy v. Dawson*, 19 N. Y. Supp. 186. After such demand the debtor cannot defeat the preference, either by preferring another creditor by way of assignment or confession of judgment. But the proceedings create no lien on the debtor's property and cannot affect an innocent purchaser. In order for the creditor making the demand to retain a preference in these proceedings, the demand must be followed up by the immediate procurement and service of the order and the diligent prosecution of the proceedings to their termination. *Hall v. Kellogg*, 12 N. Y. 332.

CHAPTER X.

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| I. WARRANT OF ARREST INSTEAD
OF ORDER.
1. In general.
2. Persons exempt from arrest.
II. AFFIDAVIT.
III. WARRANT.
3. In general. | 4. Service of.
IV. RETURN AND EXAMINATION.
5. Preliminary.
6. Undertaking required. When.
7. Proceedings after preliminary
examination. |
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I. WARRANT OF ARREST INSTEAD OF ORDER.

1. In general.—Section 2437 of the Code provides for an alternative proceeding to those provided for by sections 2435 and 2436.

It provides that upon proof entitling a judgment-creditor to an order, under either section 2435 or 2436; and also proof by affidavit to the satisfaction of the judge, that there is danger that the judgment-debtor will leave the state, or conceal himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the payment of the judgment. The judge may, instead of making an order, issue a warrant under his hand, reciting the facts, and requiring the sheriff of any county where the judgment-debtor may be found, to arrest him and bring him before the same judge, or before another judge, if the case is one where the warrant must be returnable to another judge. Section 2438 provides for an order of arrest as aforesaid, after the making of an order requiring the judgment-debtor to attend and be examined, and before the close of his examination. In order to obtain a warrant under section 2438, a state of facts must be shown that would entitle a party to a warrant under section 2437. An order for examination of a debtor, and a subsequent warrant for his arrest in such proceedings are independent, and the vacating of the order does not affect the warrant. *Frost v. Craig*, 30 N. Y. St. Rep. 848.

2. Persons exempt from arrest.—The following persons are exempt from arrest on civil process: Heads of foreign governments; foreign ministers and their domestics; enlisted men of the United States. U. S. Rev. Stat., § 4063,

1237. Militiamen of the state. Laws 1870, ch. 80 ; *People v. Campbell*, 40 N. Y. 133. New York city policeman. Laws 1882, ch. 410. Electors on day of election. Laws 1842, ch. 130. Members of the legislature (1 R. S. 154), and officers of either house. *Matter of Potter*, 55 Barb. 625. Members of congress. *Lewis v. Elmendorf*, 2 Johns. Cas. 222. Witnesses in attendance at court. *Frisby v. Young*, 11 Hun, 474 ; *Jenkins v. Smith*, 57 How. Pr. 172 ; *Matthews v. Tufts*, 87 N. Y. 568.

Parties to action are privileged while in attendance at court. *Sathinger v. Adler*, 2 Rob. 704 ; *In re Lampert*, 21 Hun, 154. An officer of a court of record, during the actual sitting, which he is required to attend, of a term of court of which he is an officer. Code Civ. Pro., § 565. By section 558 *id.*, it is provided that "a person shall not be arrested in a civil action or special proceeding except as prescribed by statute."

A woman cannot be arrested under article 1, title 1, of chapter VII, of the Code, except for willful injury to person, character or property. Code, § 553. So a person prosecuted in a representative capacity is privileged from arrest under said chapter. *Id.* 555. Where a person has been discharged from imprisonment under an order of arrest, by due course of law, he cannot be rearrested and imprisoned a second time for the same cause, though in a different form of action. *Townsend v. Nebenzahl*, 20 Hun, 83.

II. AFFIDAVIT.

Section 2437 of the Code prescribes that certain of the facts necessary to obtain an order of arrest must be made by affidavit. It also prescribes what proof must be adduced.

Under this and the next section it is necessary for the creditor, before he is entitled to a warrant of arrest against the judgment-debtor, to establish the same facts in respect to the judgment, execution, debtor's residence or place of business, that are required for the order which the warrant is to represent. The creditor must further establish to the satisfaction of the judge to whom the application for the issuing of the warrant is presented, that there is danger that the judgment-debtor will leave the state or conceal himself, and that there is reason to believe that he has

property which he unjustly refuses to apply to the payment of the judgment.

It seems that the affidavit must positively show the facts or it must show the facts, circumstances and information upon which his belief is founded. *Netzel v. Mulford*, 59 How. Pr. 452. The affiant must give the facts from which his conclusions were drawn, so that others can judge whether he reasoned correctly. He must show that there is reason to believe that the judgment-debtor has property which he unjustly refuses to apply to the payment of the judgment. The creditor must show what property the debtor has, or, at least, that he has property. *Heller v. De Leon*, 26 N. Y. St. Rep. 102.

He must specify the particular form in which the property exists. If he does not know, and only arrives at his conclusions by a process of reasoning, he should give the facts on which his inference is based. The warrant and affidavit upon which it is founded must be served upon the judgment-debtor by delivering to and leaving with the debtor copies thereof. Code, § 2453. While the rule which has been mentioned cannot operate as a hardship upon the creditor, the want of it may prove highly prejudicial to the debtor. The liberty of the citizen is of quite as much importance as the preservation or security of his property, and the provisions of the Code, in relation to obtaining orders of arrest, should be strictly construed. *Southern I. N. & I. Co. v. Sherwin*, 1 Civ. Proc. Rep. 44. It is not necessary that the affidavits should specify the grounds, in terms, prescribed by section 2437 of the Code, it is enough that they state facts sufficient to authorize the conclusion that the grounds exist in fact.

Thus the affidavit must positively show that the debtor intends to leave the state, or, it must aver his threats and declarations to do so, or state facts and circumstances evincing or amounting to an intention to leave. *Hitchcock v. Peterson*, 14 Hun, 389. But facts must be positively stated, or where the facts are not within the actual knowledge of the plaintiff or his witnesses, information may be stated, but the sources of such information must also be stated. The affidavit must contain all the essential facts from which the judge can draw the conclusion that a right

to an order of arrest exists. *Meriden Malleable Iron Co. v. Bandman*, 2 Week Dig. 591. Thus, the applicant for a warrant must adduce proof to satisfy the judge that there is danger that the judgment-debtor will leave the state or conceal himself. The clause "and that there is reason to believe that he has property which he unjustly refuses to apply to the payment of the judgment," is the same as section 2436.

III. WARRANT.

1. In general.—Section 2437 of the Code provides that "The judge may, instead of making an order, issue a warrant under his hand, reciting the facts, and requiring the sheriff of any county, where the judgment-debtor may be found, to arrest him and bring him before the same judge, or before another judge.

The facts which the Code prescribes must be recited in the warrant are : the recovery of the judgment, issue of execution, etc., that there is danger that the judgment-debtor will leave the state (if that be the ground stated in the affidavit), or conceal himself—when that is the ground of application—and that there is reason to believe that he has property which he unjustly refuses to apply upon the judgment.

The warrant is issued in the name of the People. Section 2434 prescribes what judge may issue the warrant. The warrant must direct the sheriff of the county where the judgment-debtor is found, to arrest him and bring him before the judge granting the order, or, if the judge does not reside within the judicial district embracing the county to which the execution was issued, the warrant must be returnable to a judge in that district, etc. An order issued after an order for examination has been made requires the same recitals as one granted independent of the order. Code, § 2438.

4. Service of.—The warrant may be served in any part of the state. The sheriff, when he arrests a judgment-debtor, must deliver to him a copy of the warrant and of the affidavit upon which it was granted. Code, § 2453.

IV. RETURN AND EXAMINATION.

1 Preliminary.—The return of the officer must show that at the time of making the arrest he delivered to the

judgment-debtor a copy of the warrant and of the affidavit upon which it was granted. Code, § 2453. When the judgment-debtor has been arrested and brought before a judge he is entitled to a preliminary examination, in which the judgment-creditor must substantiate the charge in the affidavit or affidavits upon which the warrant was founded, and upon this preliminary examination the creditor must make it appear to the satisfaction of the judge that there is danger that the debtor will leave the state or conceal himself, and that he has property which he has unjustly refused to apply to the satisfaction of the judgment. This he may do by an examination of the judgment-debtor or by other proof. It is evident from the reading of section 2440 that upon the preliminary hearing witnesses may be examined on both sides to prove or disprove the facts and circumstances in the affidavit upon which the warrant was issued.

8. Undertaking required—When.—After the preliminary examination is finished if the judge is satisfied that there is danger that the judgment-debtor will leave the state or conceal himself, or that he has property which he unjustly refuses to apply to the satisfaction of the judgment, he may make an order requiring the judgment-debtor to give an undertaking, with one or more sureties, in a sum fixed and within a time specified in the order, to the effect that he will from time to time, as the judge directs, attend before the judge or before a referee, appointed or to be appointed in the proceedings, and that he will not until discharged from arrest by virtue of the warrant dispose of any of his property which is not exempt from seizure by section 2463 of the Code. If the debtor fails to comply with the order the judge must forthwith by warrant commit him to prison, there to remain until the close of the examination or the giving of the required undertaking.

The judge may direct the sheriff to produce the debtor from time to time as required in the course of the proceedings. Code, § 2440. During the preliminary examination the debtor must remain in the custody of the sheriff.

9. Proceedings after preliminary Examination.—After the consummation of the preliminary examination the proceedings go on as if commenced by order, and the property discovered is disposed of in the same manner.

If the preliminary examination does not sustain the creditor's affidavit on which the warrant is issued the debtor must be discharged from arrest. If the warrant is issued after an order has been issued in the proceedings as prescribed by section 2438 of the Code, the vacating of the warrant does not affect the proceedings under the order. *Frost v. Craig*, 30 N. Y. St. Rep. 848.

CHAPTER XI.

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| I. PERSONS HAVING PROPERTY OF OR INDEBTED TO THE JUDGMENT-DEBTOR.
1. In general.
2. Independent proceedings.
3. Kinds of property and value.
4. Who may be examined.
5. In what county order must be made. | 6. Proof necessary to give jurisdiction.
II. ORDER, SERVICE, RETURN, EXAMINATION.
7. In general.
8. Service.
9. Proceedings after return.
10. Property discovered—How disposed of. |
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I. PERSONS HAVING PROPERTY OF OR INDEBTED TO THE JUDGMENT-DEBTOR.

1. In general.—Section 2441 of the Code of Civil Procedure allows an order for the examination of a third person as an auxillary to an order for examination under either sections 2435 or 2436. It provides that after the issuing of an execution, and either before or after its return, as provided by said sections, and upon proof by affidavit or other competent written evidence, that any person or corporation has personal property of the judgment-debtor exceeding ten dollars in value, or is indebted to him in a sum exceeding ten dollars, the judgment-debtor may have an order requiring that person or corporation to attend and be examined concerning the debt or other property at a time and place specified in the order. The order may require the person to attend before a referee designated in the order (*id.* § 2441), and the proceedings are to be conducted as prescribed in section 2444.

Property discovered under such examination may be applied to the payment of the judgment in the manner prescribed by section 2447. The person proceeded against must obey all proper orders in respect to the effects of the judgment-debtor found in his hands. To that extent he becomes a party to the proceedings taken to reach the debtor's property. *Corning v. Tooker*, 5 How Pr. 19. It has been held, notwithstanding the words of the statute, that proceedings under section 2441 are ancillary to and in aid of those under sections 2435 and 2436, and must be taken in connection with them or not at all.

2. Independent proceedings.—Section 2441 of the Code of Civil Procedure is a substitute for section 294 of the Code of Procedure ; and in *Gibson v. Haggerty*, 37 N. Y. 558, Woodruff, J., in delivering the opinion of the court says : “I am not able to perceive the force of the suggestion that an order under section 292, (now §§ 2435, 2436, Code Civ. Pro.), must be first obtained before the judge can obtain jurisdiction to make the order for the examination of a debtor of the judgment-debtor, and direct the payment of what he owes towards the judgment debt. The terms of section 244 (§ 2441) authorizes a proceeding thereunder whether the execution has been returned or only issued. It expressly leaves it in the discretion of the judge to cause notice to be given or to suffer the proceedings to be had without the presence of the party to the action.” By stipulation the only question presented in the above case was whether it was competent to make an order for the examination of a debtor of the judgment-debtor as an independent proceeding, and disconnected with any order for the examination of the debtor.

On that question, Bacon, J., says : “It has indeed been a mooted point, whether proceedings under section 294 can be taken in any other way than as connected with and auxiliary to a proceeding against the judgment-debtor under section 292. Decisions can be found at general and special terms in the supreme court on both sides of the question. If it is necessary to set the question at rest for the court to decide it, I am clearly of opinion that these two sections are susceptible of, if indeed they were not intended to have, an operation independently of each other. They have no necessary connection in terms, nor is the issuing of an order under section 294 made dependent upon an order being first issued against the judgment-debtor, and, indeed, if this were not so, cases would every day arise where no proceeding whatever could be taken under section 294.

If the judgment-debtor should abscond after judgment and before execution, or the judgment should be rendered against a corporation, there would be no possibility of reaching a claim due the judgment-debtor in the hands of a third party under this section, since no order under sec-

tion 292 could be issued in such a case. To obviate the objection that, in this way, an order may be made transferring the debt without the creditor having an opportunity to be heard, it is provided that the judge issuing the order may require notice of the subsequent proceedings to be given, in his discretion, to the judgment-debtor. Cases may easily be conceived where such notice would not be expedient, and the fact that provision is made for it, is a strong implication that the true construction of the two sections is, that they operate, and may be availed of, entirely independently of each other." *Lynch v. Johnson*, 48 N. Y. 32, 33. In *Lockwood v. Worstell*, 15 Abb. 430, it is held that these proceedings may be instituted after the original examination of the judgment-debtor is ended and a receiver of his property has been appointed.

What was said in regard to this subject in *People ex rel. Grant v. Warner*, 20 N. Y. St. Rep. 575, was not necessary to the decision of the case.

3. Kind of property and value.—In order to give a judge jurisdiction to issue an order under section 2441 of the Code of Civil Procedure, it must be positively alleged by affidavit, or the proofs offered upon the application, that the party against whom the proceedings are instituted has "personal property" of the judgment-debtor exceeding ten dollars in value, or is indebted to him in a sum exceeding ten dollars.

Alleging such fact upon information and belief, without stating the source of information, is not sufficient. *People v. Jones*, 1 Abb. N. C. 172; *Leonard v. Bowman*, 40 N. Y. St. Rep. 135; *Grinnell v. Sherman*, 33 id. 27. But if the order is granted on such statement, it is not void, but voidable only. *Fleming v. Tourgee*, 40 N. Y. St. Rep. 705; 21 Civ. Pro. Rep. 297.

An affidavit that the person has property of the judgment-debtor, or is indebted to him, is insufficient. *Collins v. Beebe*, 27 N. Y. St. Rep. 4.

4. Who may be examined.—These proceedings may be taken against any person or corporation that is supposed to have personal property of the judgment-debtor exceeding ten dollars in value, or is indebted to him in a sum exceeding ten dollars, the fact that the debt from such person to the judgment-debtor is not then due, does not exempt him

from such examination. *Davis v. Herrick*, 65 How. Pr. 290. Any one of the members of an association who holds the property thereof may be examined as to such property, whether named as an officer or not. *Courtois v. Harrison*, 12 How. Pr. 359. A receiver of a foreign corporation, appointed in another state, will not be subjected to such examination, or required to pay over moneys due a judgment-debtor. *Smith v. McNamara*, 15 Hun, 447. Neither will a receiver appointed in this state. *Fitchburgh Nat. Bank v. Bushwick Chem. Works*, 13 Civ. Pro. Rep. 155.

Nor can these proceedings be instituted upon a judgment recovered against executors or administrators. *Collins v. Beebe*, 27 N. Y. St. Rep. 4.

Nor where the judgment-debtor is a corporation created by or under the laws of this state, or a foreign corporation. An execution-creditor of a municipal corporation may have an order to examine a person indebted to, or having funds of, the judgment-debtor; so an officer of such corporation having funds in his hands may be examined. *Lowber v. Mayor*, 5 Abb. 268. A right of action in a judgment-debtor to recover damages for a personal tort cannot be reached, such a cause of action not being assignable either by voluntary act or by operation of law. *Cotterell v. Slosson*, N. Y. Daily Reg., Jan. 6, 1884.

A corporation which has had business with the judgment-debtor may be examined as a witness through one of its officers, and may be compelled to produce its books, papers and accounts for use upon such examination. *Pendergast v. Dempsey*, 18 Civ. Pro. Rep. 198; *Semmer v. Noell*, id. 200.

A judgment-creditor, by electing to bring an action to have an assignment made by the judgment-debtor adjudged to be invalid, does not waive his right to proceed under section 2441 of the Code, to compel the assignee to appear and testify. *Matter of Sickles*, 52 Hun, 527. But the proceedings cannot be continued and prosecuted after the death of the sole defendant, until his representatives are brought in as parties. *Hazewell v. Penman*, 13 How. Pr. 114. A person, holding a fund created by third persons for the relief and benefit of the judgment-debtor, cannot be compelled to pay the same over, to be applied in payment of the judgment in these proceedings. *Wilder v. Clark*, 33 N. Y. St. Rep. 143.

So money deposited by a third person, in lieu of bail for the judgment-debtor in criminal proceedings, cannot be reached as the property of the latter in these proceedings. *McShane v. Pinkham*, 46 id. 65. Surplus trust funds, if due and payable, may be reached in these proceedings. *Lawrence et al. v. Pease*, 50 id. 851.

5. In what county order must be made.—The execution must be issued to the county where the judgment-debtor resided, or where he had a place for the transaction of business in person when the proceedings were commenced. *Schenck v. Erwin*, 38 N. Y. St. Rep. 603; 15 N. Y. Supp. 55. And unless the proof for an order shows such fact, the judge has no jurisdiction to grant the order. The only exception to this rule is where the judgment-debtor is a non-resident of the state. It is held in *Merrill v. Allen*, 13 N. Y. St. Rep. 20, that when proceedings are taken against a debtor of the judgment-debtor for the purpose of securing an application of an indebtedness toward the payment of the judgment, when the execution is in the hands of the sheriff, the judgment-debtor is in a sense a party to such proceedings, and the judge in any county other than the one in which the judgment-debtor resides has no jurisdiction over the subject-matter. On this subject the court say: "The question presented is one of interest, as well as great practical importance, and which has not been adjudicated. * * * Its solution involves a construction of several of the sections of the Code found in the chapter relative to proceedings supplementary to execution against property." In that case the judgment was originally docketed in New York county, where the judgment-debtor resided, and a transcript thereof filed and the judgment docketed in Ontario county. An execution was issued to the sheriff of New York county and returned unsatisfied, subsequently an execution was issued to the sheriff of Ontario county; and it seems that before the return of the execution issued to the sheriff of Ontario county, an order was granted under section 2441 for the examination of persons then residing in Ontario county, indebted to the judgment-debtor.

It was contended, in that case, that by force of the provisions contained in section 2434, the county judge of

Ontario county had jurisdiction to issue an order requiring a debtor of the judgment-debtor, or a person having property of the judgment-debtor in his possession and residing in Ontario county, to appear before him and make answer concerning the same, as the judgment had been docketed in that county, and an execution regularly issued and was then in the hands of the sheriff of that county. On the part of the judgment-debtor, it was contended that as the judgment-debtor had a residence in the city and county of New York, proceedings of this character could only be instituted by virtue of and in aid of an execution issued to the sheriff of that county, and that they must be conducted by and before one of the judges of New York county, or if all of them should be absent from their county, or for any reason they were unable or disqualified to act, then before a justice of the supreme court of that district, as mentioned and regulated in section 2434. The court (page 22) say: "We are inclined to concur with the last proposition." The result of this construction of the statute is, that the county judge of Ontario county did not have jurisdiction of the subject-matter.

The provision of section 2434 that "either special proceeding may be instituted before a judge of the court out of which, or the county judge or the special county judge of the county to which the execution was issued," refers to the county judge, or special county judge, of the county to which an execution has been issued, as provided in section 2458, as section 2441 provides that these proceedings can be instituted only on proof that an execution has been issued "as prescribed in section 2458." It is held in *Schenck v. Erwin*, 43 N. Y. St. Rep. 862, that a county judge, of a county other than that of the debtor's residence, has no authority to grant a third-party order. And where such order was granted, and the county judge of the debtor's residence, before whom supplementary proceedings had been instituted, subsequently made an order directing such third party to pay over to a receiver, it was held that no jurisdiction over such third party had been acquired, and that such order was unauthorized.

6. Proof necessary to give jurisdiction.—The affidavit or other written evidence upon which to predicate an order

for the examination of a third person must establish the fact that an execution against the property has been issued, as prescribed in section 2453 of the Code of Civil Procedure, and either that it has been returned wholly or partly unsatisfied, or that it has not been returned. It should allege the same facts in respect to the judgment and parties to it as are required by sections 2435 or 2436. If the application is based on the fact that the execution has been returned, it should appear that the first execution issued upon the judgment was returned within ten years from the time of the application for the order. If the proof shows that the execution has not been returned it should also show that such execution was issued within five years after the original entry of the judgment, or that an execution had been issued on the judgment within five years from such entry and returned, or that the execution upon which the application for the order was made was issued by leave of the court. The affidavit must also show that the execution on which the proceeding is based has been issued to the sheriff of the county where the judgment-debtor resides when the proceeding is commenced. *Schenck v. Erwin*, 38 N. Y. St. Rep. 603.

But it is not necessary to show a demand and the other facts required for the examination of the judgment-debtor. *Potts v. Davidson*, 1 How. N. S. 216. It is necessary to show either "that the defendant is a resident" or "that he has a place of business within the county," for either will suffice, but it should not follow the alternative wording of the statute, that he is a resident or has a place of business within the county. *Kellogg v. Freeman*, 2 City Ct. 147. So the affidavit which states that the execution was issued to a county where the judgment-debtor then resided, and yet resides, or has a place for the regular transaction of business in person, and on information and belief that the third party has property of the judgment-debtor exceeding ten dollars in value (or is indebted to him in such sum), is defective in making the statement in the alternative, and in failing to state the sources of the information, and is insufficient to sustain the proceeding. *Leonard v. Bowman*, 40 N. Y. St. Rep. 135.

Nevertheless the order is not void, and must be obeyed so long as the proceedings before the judge gave him jurisdiction of the subject matter and of the person proceeded against. *Fleming v. Tourgee*, id. 705. An affidavit stating in the alternative form that a third person has property of the judgment-debtor, or is indebted to him, is insufficient to authorize the granting of a third-party order. *Collins v. Beebe*, 27 id. 4. But a third-party order, though supported by an insufficient affidavit, is not void, and it is incumbent on a party proceeded against to obey it or take proper steps to set it aside. He cannot treat it as a nullity. *Matter of Fleming v. Tourgee*, 40 id. 705; *Cooman v. Board of Education*, 37 Hun, 96. The questions in *Grinnell v. Sherman*, 33 N. Y. St. Rep. 27, arose upon a motion to set aside an order appointing a receiver, and all irregularities, if any, in the original affidavits seem to have been waived. The affidavit, if made by a stranger to the record, must show that the proceedings are authorized by the judgment-creditor, his assignee or representatives. *Brown v. Walker*, 121 N. Y. 717; 28 N. Y. St. Rep. 36.

It should state that the person to be examined has "personal property" of the judgment-debtor; and an affidavit which alleges upon information and belief that the person sought to be examined has personal property of the judgment-debtor exceeding ten dollars in value, is sufficient, although the sources of deponent's information are not stated. *Teft v. Epstein*, 17 Civ. Pro. Rep. 168. The affidavit should state whether or not proceedings under either section 2435 or 2436 of the Code of Civil Procedure, are pending, and give the residence of the person to be examined. The property sought to be reached should be described, and the origin of the indebtedness.

II. ORDER, SERVICE, RETURN, EXAMINATION.

7. **In general.**—The order should recite the jurisdictional facts prescribed by section 2441 of the Code of Civil Procedure, and direct the person or corporation to attend and be examined concerning the debt or other property, at a time and place specified in the order. If a corporation is to be examined, the order should name the officer to be examined. *Pendergast v. Dempsey*, 18 Civ. Proc. Rep. 198.

It need not contain the matters requisite to an affidavit and order to examine the judgment-debtor himself before the return of the execution, although the application for the order is made before the return of execution. *Potts v. Davidson*, 1 How. N. S. 216. The order may require the person to attend before a referee designated therein, but it must fix a time and place for such examination. But it seems that section 2444 of the Code Civil Procedure empowers the referee with authority to compel the parties or witnesses on adjourned days.

If the person required to attend is a resident of the state or then has an office within this state, for the regular transaction of business in person, the order must direct the examination to be in the county where such residence or place of business is situated. Code, § 2459. Whether or not a non-resident of the state having no place of business within this state can be compelled to attend in the county where the judgment-roll is filed when such county is not the county where the service of the order is made, *quare*. *Heckman v. Bach*, 20 Abb. N. C. 401.

8. Service.—The order must be served as prescribed by Code, § 2452. . *People v. Warner*, 20 N. Y. St. Rep. 573; 51 Hun, 53.

The original order, under the hand of the judge making it, must be exhibited to the person to be served. A copy thereof, and the affidavit upon which it was made, must be delivered to him. Service upon a corporation is made by the service being made on an officer designated in the order, or an officer upon whom a summons in an action may be served.

Such third person is not entitled to be paid witness fees as a condition to his obedience to the order. *Heckman v. Bach*, 20 Abb. N. C. 401. What was said in *People v. Warner*, 51 Hun, 57, relates exclusively to witnesses, and has no relevancy as regards persons examined under section 2441 of the Code of Civil Procedure. A party examined under this section is protected by section 2456.

9. Proceedings after return.—Section 2444 of the Code of Civil Procedure provides that “upon an examination under this article * * * either party may be examined as a witness in his own behalf and may produce and examine

other witnesses, as upon the trial of an action. The creditor is not deprived of his right to a complete discovery of the facts by a claim of a witness that he is the owner by purchase of the property concerning which the inquiry is made. *Mechanics' & T. Bank v. Healey*, 14 Week. Dig. 120. The whole examination must have for its single object to ascertain whether there is any property of the debtor which ought to be applied to the payment of plaintiff's claim, and the extent of the inquiry in each particular case must be left to the good sense of the officer under whose direction it takes place, having in view the general object. In these proceedings the witnesses may be cross-examined the same as on the trial of an action. The party may be examined to prove that he has been a party or privy to, or knowing of a conveyance, assignment, transfer or other disposition of the judgment-debtor's property for any purpose, and such party is not excused from answering a question on the ground that he or another person claims to be entitled to hold the property. Code, § 2460.

10. Property discovered.—How disposed of.—Where it appears that one or more articles of personal property of the judgment-debtor capable of delivery, and not exempt from these proceedings by section 2463 of the Code of Civil Procedure, his right to the possession whereof is not substantially disputed are in the possession or under the control of another person, the judge, by whom the order was granted, or to whom it is returnable, may, in his discretion and upon such a notice, given to such persons as he deems just, or without notice make an order directing such person to deliver the articles of personal property to a sheriff designated in the order or to a receiver in the action. Code, § 2447.

CHAPTER XII.

I. REFERENCE AND PROCEEDINGS
THEREUNDER.

1. In general.
2. Who may be referee.
3. By whom appointed.

4. Where reference may be executed.
5. Oath of referee.
6. Power of referee.
7. Proceedings before referee.

I. REFERENCE AND PROCEEDINGS THEREUNDER.

1. In general.—The judge granting an order for examination in supplementary proceedings may appoint a referee to take the testimony, and require the judgment-debtor or party named in the order to attend and be examined before such referee. Code, § 2442; *Howe v. Welch*, 11 Civ. Pro. Rep. 444. Only the examination or the ascertaining of certain facts is referred, the proceedings themselves remain before the judge before whom the order is returnable. The referee must certify the testimony to the judge to whom the order is returnable and the other proceedings taken before him. The judge to whom the order is returnable may, at any stage of the proceedings, make an order directing that any further examination or testimony be taken by, or that a question arising, be referred to a referee designated in the order. Where a question is so referred the referee may be directed to report either the evidence or the facts. Code, § 2443. This section does not apply to an order of reference to examine the debtor or witnesses in the proceedings, but applies only to incidental questions of fact arising at any stage of the proceedings before a judge to whom the order is returnable. *Howe v. Welch*, 11 Civ. Pro. Rep. 445. The Code does not require the order appointing the referee for examination of debtor or third person under either sections 2435, 2436 or 2441 to be incorporated with the order requiring the creditor to appear. *Lewis v. Penfield*, 39 How. Pr. 490. Where the order is made under either sections 2435 or 2436 it need not name the time or place for the appearance of the judgment-debtor, but it may direct the debtor to appear at such times and places as may be appointed by the referee, and the referee may issue his summons for the debtor to appear

before him at a time and place designated in such summons, and the debtor will be guilty of contempt if he fails to obey such summons. *Redmond v. Goldsmith*, 2 Law Bull, 19. But an order of reference under sections 2440 and 2441 of the Code of Civil Procedure must fix the time and place for examination.

2. Who may be referee.—Except in cases provided for by section 1011 of the Code of Civil Procedure, no person, unless he is an attorney of the court in good standing, can be appointed sole referee for any purpose in any pending action or proceeding. Nor can any person be appointed a referee who is the partner or clerk of the attorney or counsel of the party in whose behalf such application for such appointment is made, or who is in any way connected in business with such attorney or counsel, or who occupies the same office with such attorney or counsel. S. C., rule 80. *Gilbert v. Frothingham*, 13 Civ. Pro. Rep. 288.

Section 1011 of the Code of Civil Procedure provides that parties by stipulation may enter an order appointing anyone a referee to try their matters.

The appointment in these proceedings is made *ex parte* upon application of the judgment-creditor, who generally names the referee. But if he is objectionable the aggrieved party may apply on notice to the judge to modify or vacate the order or appoint another referee.

3. By whom appointed.—An order of reference allowed by section 2442 of the Code of Civil Procedure must be made by the judge granting the order for examination at the time of the granting of such order. The only order of reference that can be made after the granting of the order for examination is one under section 2443 to investigate questions of fact. But if the referee appointed by the original order dies the judge may appoint another. *Allen v. Starring*, 26 How. Pr. 57.

In proceedings under section 2441 of the Code of Civil Procedure, where the debtor of the judgment-debtor, for the examination of whom an order is applied for, resides in a county other than that of the judgment-debtor his examination must be had either before a justice of the supreme court or before a referee, as the order cannot be

made by a local judge other than one of the county where the judgment-debtor resides (*Schenck v. Erwin*, 43 N. Y. St. Rep. 862; *Merrill v. Allen*, 13 id. 20), and such third party cannot be compelled to attend pursuant to the order or to any adjournment at a place without the county wherein his residence or place of business is situated. Code, § 2459.

The judge to whom an order is returnable may remove a referee and appoint another in his place, and direct the debtor to appear and answer before him at a time and place stated. *Pardee v. Tilton*, 83 N. Y. 623.

4. Where reference may be executed.—It seems that any of the judges mentioned in section 2434 of the Code may appoint a referee to hold sessions in any county in the state, and may enforce attendance before such referee in any case where it may be done by a justice of the supreme court. *Bingham v. Disbrow*, 37 Barb. 24.

Section 349 of the Code of Civil Procedure provides that “The county judge possesses the same power and authority in a special proceeding, which can be lawfully instituted before him out of court, which a justice of the supreme court possesses in a like special proceeding instituted before him in like manner, and section 241 gives the same jurisdiction to other judges.

5. Oath of referee.—Unless the parties expressly waive the referee’s oath, a referee appointed in supplementary proceedings must, before entering upon an examination or taking testimony, subscribe and take an oath that he will faithfully and fairly discharge his duty upon the reference, and make a just and true report according to the best of his understanding. Code, § 2445.

6. Power of referee.—A referee appointed under section 2342 of the Code of Civil Procedure must certify to the judge to whom the order is returnable, all the evidence and the other proceedings taken before him. An order of reference under section 2443 may direct the referee to report either the evidence or the facts.

An order for examination under either section 2435 or 2436, may direct the party to be examined to appear before a referee at such times and places as the referee may appoint and direct.

In such cases the referee brings the parties before him by

a summons, in which the time and place for the hearing is fixed. *Redmond v. Goldsmith*, 2 Law Bull. 19. Such summons must be personally served upon the judgment-debtor. This summons should be entitled in the proceedings and alleged by the referee, and should state the nature of the proceedings, unless served with the original order. The referee has no control over the person of the party or witness, and cannot punish for misconduct or disobedience of an order or subpoena. He can direct the party or witness to do certain things, but if the party or witness refuses or neglects to do as directed, the referee can only certify the proceedings to the judge or court. *Green v. Bullard*, 8 How. Pr. 313, 318. The referee may adjourn any proceedings from time to time as he thinks proper. Code, § 2444. But he has no power to compel an attendance on the adjourned day. All he can do is to direct the party or witness to appear on the adjourned day, and if he refuses certify the proceedings to the judge or court. The referee may adjourn the proceedings in the absence of the party to be examined. But in such a case he must cause his summons to be served upon the judgment-debtor or person to be examined, in which the time and place for the adjourned hearing must be stated, and the summons must direct the party to appear at such time and place.

7. Proceedings before referee.—After the referee has been sworn he may proceed with the examination of the parties and their witnesses as prescribed by section 2444 of the Code of Civil Procedure. He must swear each witness examined, and reduce the testimony of each witness to writing in the form of a deposition, and direct the witness to sign the same. A subpoena for a witness to be examined before him, must be issued under his hand pursuant to section 854. *Knowles v. DeLazare*, 3 How. N. S. 35; *People v. Ball*, 37 Hun, 245.

And the referee may require the witness to produce papers either by subpoena, *duces tecum* or by an order under sections 867 and 869 of the Code of Civil Procedure. The proceedings before the referee are certified to the judge to whom the order is returnable. But it may be used before any court having jurisdiction to punish a party or witness in the proceedings for contempt, in not obeying the direc-

tions made by him. If for any reason the referee or the judgment-debtor fails to appear at the time appointed for the hearing of the matter, the matter does not abate, but the matter may be continued by the service of a summons under the hand of the referee, fixing the time and place for a further hearing of such proceeding.

CHAPTER XIII.

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| I. WITNESSES IN SUPPLEMENTARY PROCEEDINGS.
1. In general.
2. Attendance, how enforced.
3. Subpœna, how served. | 4. Penalty for disobeying subpœna.
5. Contents of warrant.
6. Right of witness to counsel.
7. Signing and filing depositions. |
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I. WITNESSES IN SUPPLEMENTARY PROCEEDINGS.

1. In general.—The examination in these proceedings is to all intents and purposes a trial, so far as the taking of testimony is concerned. Section 2444 of the Code expressly declares that either party may be examined as a witness in his own behalf, and may produce and examine other witnesses, as upon the trial of an action. A witness or party may be required by subpœna "*duces tecum*" to produce papers or books on an examination. *Champlin v. Stoddard*, 17 Week. Dig. 76. So an order may be made for the production of books, etc., under sections 867, 869 of the Code instead of resorting to a subpœna. *Pruden v. Tallman*, 6 Civ. Pro. Rep. 362. But whether the production of the books of a corporation, when it is examined as a third party, can be compelled by an order under sections 867 and 869 of the Code, *quaere*. Section 868 of the Code provides that the production of a book or paper, belonging to or under the control of a corporation, may be compelled by a subpœna "*duces tecum*," or an order as the case requires, which must be served upon the president, or other head of the corporation, or an officer thereof in whose custody the book or paper is. Code, § 868; *Holmes B. & H. v. Street*, 6 Civ. Pro. Rep. 362n. The appearance of any officer of the corporation who can identify the book or paper and testify respecting the purposes for which it is used, will be sufficient obedience to the mandate. Code, § 869.

2. Attendance, how enforced.—Section 854 of the Code of Civil Procedure provides that, where a judge or an arbitrator, referee or other person, or a board or committee has been heretofore or is hereafter expressly authorized by law to hear, try or determine a matter, or to do any act in an official capacity in relation to which proofs may be taken,

or the attendance of a person as a witness may be required * * * a subpoena may be issued, by and under the hand of the judge, arbitrator, referee or other person * * * requiring the person to attend; and also in a proper case, to bring with him a book or paper. A subpoena in the usual form of a subpoena in an action and signed by a clerk of the court, is insufficient unless it is also signed by the judge or referee before whom the proceedings are pending. *People v. Ball*, 37 Hun, 245. Until an order under sections 2435, 2436, 2441 of the Code, or a warrant under sections 2437 or 2438 has been served as required by law, the judge or referee has no jurisdiction to proceed in the matter, and a witness who is subpoenaed and refuses to be sworn and testify, is not guilty of contempt. *People ex rel. Grant v. Warner*, 20 N. Y. St. Rep. 573.

3. Subpoena, how served.—The subpoena must be served as follows: The original subpoena must be exhibited to the witness, and a copy thereof or a ticket containing its substance must be delivered to him. The fees allowed by law, —four cents per mile,—for traveling to, and returning from, the place where he is required to attend, if he resides more than three miles from the place of attendance, and for one day's attendance—fifty cents—must be paid or tendered to him. Code, §§ 852, 854, 3318.

A person shall not be compelled to produce a book of account except the subpoena be served at least five days before the day when he is required to attend. Code, § 867.

4. Penalty for disobeying a subpoena.—If a witness, duly subpoenaed, refuses or neglects to obey it, he is liable for the damages sustained by the person aggrieved, in consequence of the failure of the witness to attend, and fifty dollars in addition thereto to be recovered as prescribed in sections 852–855 of the Code of Civil Procedure. A witness once subpoenaed and called to testify, must remain until the examination is concluded, unless discharged by consent or by the court. *Neil v. Thorn*, 88 N. Y. 270. A person subpoenaed to attend forthwith, has a reasonable time to obey by means of ordinary methods. *People v. Potter*, 6 N. Y. St. Rep. 753. Where the witness fails to obey the subpoena, the judge before whom the proceedings were instituted, or before whom the same

is returnable, may issue a warrant to the sheriff of the county commanding him to apprehend the defaulting witness, and bring him before the officer, person or body before whom or for which his attendance was required. Code, § 855. If the person subpoenaed refuses to be examined or to answer a legal or pertinent question, or to produce a paper which he was directed to bring by the terms of the subpoena, or to subscribe his deposition after it has been correctly reduced to writing, the person issuing the subpoena, if he is a judge of a court of record, or if he is not, then any judge of such court may, upon proof by affidavit of the facts, by warrant commit the offender to jail, there to remain until he submits to do the act which he was so required to do, or is discharged according to law. Code, § 856. The power of the court to punish a witness for contempt, proceeds not upon the ground of any damages sustained by a suitor in court, but is given to vindicate the dignity of the court, and a perfectly clear case should be established before a resort is had to this extraordinary jurisdiction. 1 Greenl. Ev., § 319.

5. Contents of warrant.—A warrant of commitment, issued as prescribed in section 856 of the Code, must specify particularly the cause of the commitment, and, if the witness is committed for refusing to answer a question, the question must be inserted in the warrant. Code, § 867.

6. Right of witness to counsel.—The examination of witnesses in these proceedings is often taken for the sole purpose of obtaining information on which to found an action by the receiver to be appointed, or to file a creditor's bill against the witness. To deny a witness in such a case the benefit of counsel, might tend to invite rather than prevent needless litigation. In case a party is called as a witness by his opponent, he should be allowed the benefit of counsel, as upon a trial of an action, and notwithstanding what was said in *Sandford v. Carr*, 2 Abb. Pr. 462, and *Corning v. Tooker*, 5 How. Pr. 16, the fact that a witness attends accompanied by counsel is neither offensive nor dangerous. There can be no general rule on the subject, as each case must stand on its own peculiarities. *Schwab v. Cohen*, 13 N. Y. St. Rep. 709.

7. **Signing and filing depositions.**—The depositions of witnesses in these proceedings must be filed. *Foster v. Twigg*, 18 Week. Dig. 563. These depositions are records of the court, in which all parties have an interest. *Renner v. Meyer*, 22 Abb. N. C. 438. A witness cannot be compelled to subscribe his testimony erroneously taken down.

He is entitled to have the minutes changed, so as to give the testimony correctly. *Sherwood v. Dolen*, 14 Hun, 191.

The power to compel a witness to be examined, or to answer a legal and pertinent question, or to produce a book or paper, or to subscribe his deposition after it has been correctly reduced to writing, is given by section 856 of the Code.

CHAPTER XIV.

PROCEEDINGS FOR COLLECTION OF JUDGMENT BEFORE APPOINTMENT OF RECEIVER.

I. ORDER FOR VOLUNTARY PAYMENT BY DEBTOR OF JUDGMENT-DEBTOR.	making of order or warrant for examination.
1. In general.	8. Disputed title.
2. Order necessary, and when to be made.	9. Lien on fund.
3. When order no protection.	III. WHAT PROPERTY CANNOT BE REACHED.
II. ORDER REQUIRING DELIVERY OF MONEY OR PROPERTY TO SHERIFF OR RECEIVER.	10. In general.
4. In general.	11. Exempt property.
5. Kind of property.	12. Trust fund created by a person other than the debtor.
6. Choses in action.	13. Earnings—When exempt.
7. Property acquired after the	14. Alimony.
	IV. APPLICATION OF MONEY OR PROPERTY TO PAYMENT OF JUDGMENT.

I. ORDER FOR VOLUNTARY PAYMENT BY DEBTOR OF JUDGMENT-DEBTOR.

1. In general.—Section 2446 of the Code provides that “at any time after the service of an order or warrant in supplementary proceedings, and before the appointment of a receiver therein, the judge by whom the order or warrant was granted, or to whom it is returnable, may, upon proof by affidavit that a person or corporation is indebted to the judgment-debtor, and either with or without notice to such person, make an order permitting the person or corporation to pay to a sheriff designated in the order a sum on account of the alleged indebtedness.

A payment thus made is to the extent thereof a discharge of the indebtedness, except as against a transferee from the judgment-debtor in good faith and for a valuable consideration, of whose rights the person or corporation had actual or constructive notice when the payment was made.

Under the old Code the payment was allowed to be made as soon as an execution was issued on the judgment, and after the original creditor had assigned the debt the debtor

could not pay the debt to the sheriff in discharge of his liability, although he had no notice of the assignment. *Adams v. Welsh*, 43 N. Y. Supr. Ct. 52; *Hall v. Olney*, 65 Barb. 27.

2. Order necessary, and when to be made.—In order to protect the debtor of a judgment-debtor when sued for a debt which he has voluntarily paid to a sheriff under section 2446 of the Code of Civil Procedure, he must establish, 1st, That at the time of making such payment proceedings supplementary to execution were pending against his creditor; 2nd, That a receiver had not been appointed in said proceedings or a receivership extended thereto; 3rd, That the judge by whom the order or warrant in the proceedings was granted, or to whom it is returnable, made the order permitting the payment. He must also show the judgment upon which the payment was made. *Handley v. Greene*, 15 Barb. 601.

An assignment in proceedings under the bankrupt act discharges the lien of an order, and no intervention or action of the court is required. *Duffield v. Horton*, 73 N. Y. 218.

3. When order no protection.—Payment pursuant to an order under section 2446 of the Code of Civil Procedure is no protection to the party making the payment when the debt is for exempt property or for the wages of a householder which are exempt by section 2463.

II. ORDER REQUIRING DELIVERY OF MONEY OR PROPERTY TO SHERIFF OR RECEIVER.

4. In general.—Where it appears from the examination or testimony taken in supplementary proceedings that the judgment-debtor has in his possession or under his control money or other "personal property" belonging to him, or that one or more articles of "personal property," capable of delivery (his right to the possession whereof is not substantially disputed), are in the possession or under the control of another person, the judge by whom the order or warrant was granted, or to whom it is returnable, may, with or without notice, make an order directing the judgment-debtor or other person immediately to pay the money or deliver the articles of "personal property" to a sheriff

designated in the order, unless a receiver has been appointed or a receivership has been extended to the special proceeding, and in that case to the receiver. Code, § 2447.

5. Kind of property.—Section 2447 of the Code provides for an order, where it appears that the judgment-debtor has in his possession “money” or “other personal property” belonging to him. It makes no distinction between proceedings instituted by order after the return of execution, and those instituted before the return of execution; although we have seen those instituted before the return of execution are confined to equitable and concealed property. In *First Nat. Bk. of C. v. Martin*, 49 Hun, 573, the court say: “The proceedings are supplementary to execution, and are not intended to take the place of, or to be a substitute for, the execution. In that case the court in substance held that these proceedings cannot be held until the judgment-creditor has exhausted his remedy by execution. It seems, therefore, that any personal property of the judgment-debtor in his possession or under his control, subject to levy and sale under execution, must be reached in that way.

Section 2447 of the Code provides for the delivery of “personal property,” capable of delivery, of the judgment-debtor, his right to the possession whereof is not substantially disputed, which is in the possession or under the control of another person.

The term “money” is not used in regard to the property of the judgment-debtor in the hands of a third person; and it would seem that the law-makers intended to include money in the term “personal property.” It has been held that the debtor’s interest in an estate as next of kin could be reached, so also his interest in a partnership. *Webb v. Overman*, 6 Abb. 92; *McArthur v. Hoysord*, 11 Paige, 495.

The debtor’s right to redeem the real property of his debtor sold on execution, may be reached after the appointment of a receiver. *Van Rensselaer v. Sheriff of Onondaga*, 1 Cow. 443. So the right of dower of a widow can be reached. *Moak v. Coats*, 33 Barb. 498. So may also an annuity bequeathed to a widow in lieu of dower. *Degrau v. Clason*, 11 Paige, 136. Under these proceedings, the court is authorized, on the examination of a third party, to direct such person to pay over any money, or deliver

any property which he may have in his hands belonging to the judgment-debtor, where there is no substantial dispute touching the possession or ownership of the property. *Bauer v. Bets*, 4 N. Y. St. Rep. 92.

It seems that the interest of a judgment-debtor in a contract for the purchase of real estate may be reached in these proceedings. *Ellsworth v. Cuyler*, 9 Paige, 418. The courts having jurisdiction of the person may compel conveyance of real estate, situate outside of the state, not subject to our statutes or the jurisdiction of our courts, to a receiver. *First Nat. Bk. of C. v. Martin*, 49 Hun, 574. The same rule applies to personal property situated out of the state. *Bunn v. Fonda*, 2 Code Rep. 70.

Money due on a contract for work to be done and payable as the work progresses may be reached, if due at the time the order for examination is made. *Burnett v. Ricker*, 13 Civ. Pro. Rep. 338. An annuity given to husband and wife belongs solely to husband during the joint lives, and is liable for his debts. *Gifford v. Rising*, 28 N. Y. St. Rep. 310, and so is money paid in advance for two years' board of judgment-debtor and his wife. *Davis v. Briggs*, 24 id. 896. The question is, whether the judgment-debtor has any property in his possession or under his control at the time of the commencement of the proceedings, to make the order without proof of ability to comply would be reviving in another form imprisonment for debt. *The Columbian Institute v. Cregan*, 3 id. 287.

6. Choses in action.—All choses in action that are assignable may be reached in these proceedings. Thus, a bank account may be reached. *Green v. Griswold*, 23 N. Y. St. Rep. 218. So may a right of action for damages upon contract. *Ten Broeck v. Sloo*, 13 How. Pr. 28. And a judgment in an action for tort. *Mallory v. Norton*, 23 Barb. 424. So may a seat in an exchange, and the debtor compelled to sign a consent that the purchaser of such seat be vested with all rights and benefits which inure to his membership, and the exchange may be compelled to receive and accept such new member and fully recognize his membership. *Roome v. Swan*, 15 Civ. Pro. Rep. 344; *Powell v. Waldron*, 89 N. Y. 328; *Ritterband v. Baggett*, 4 Abb. N. C. 67. So a patent right may be reached in these proceed-

ings. *Gillett v. Bate*, 86 N. Y. 87; *Barnes v. Morgan*, 3 Hun, 703. Accrued income payable to the debtor from a trust fund may be reached. *Lawrence et al. v. Pease*, 50 N. Y. St. Rep. 851. In short, whatever rights of action are assignable or transmissible to the personal representatives, may be reached by these proceedings, unless exempt by law, and whatever thing in action will pass to assignees in case of insolvency, will vest in a receiver herein. But the judge, under this section, is vested only with power to direct the application of any money or personal property in the possession or under the control of the judgment-debtor belonging to him, to a sheriff designated in the order or to a receiver, if one has been appointed. *Boelger v. Swivel*, 1 How. N. S. 372. The judge cannot direct the property to be delivered to the judgment-creditor. *Dickinson v. Onderdonk*, 18 Hun, 479.

7. Property acquired after the making of order or warrant for examination.—The property mentioned in supplementary proceedings is that which the debtor has when the order is made, and not such as he afterwards acquires. *Potter v. Low*, 16 How. Pr. 549. Nor a debt subsequently to become due on a contingency, or for work to be performed, nor property received between the making and the service of the order. *Atkinson v. Sewine*, 11 Abb. N. S. 384. And an order forbidding a judgment-debtor to dispose of his property, only applies to property then owned by him. *McGivney v. Childs*, 41 Hun, 607. So earnings received or becoming due after the service of the injunction order are not within its prohibition. *Guregani v. Wheelright*, 3 Abb. N. S. 264. Thus, when an order for examination was obtained July 5th, and debtor's salary became due and payable July 10th, and certain commissions earned by him would not be due and payable until the end of the year, it was held that the money could not be reached. *Albright v. Kempton*, 4 Civ. Pro. Rep. 16. No court has power to anticipate the earnings of a debtor or to direct him to appropriate future earning to the payment of a judgment. *Columbian Institute v. Cregan*, 11 Civ. Pro. Rep. 87.

An order obtained on the last day of the month will not reach the month's salary only due at the expiration of that day. *First Nat. Bank v. Beardsley*, 8 Weck. Dig. 7. And

when there is some uncertainty as to whether the debtor earned the money after the order was made, it inures to his benefit. *Potter v. Low*, 16 How. Pr. 549.

8. Undisputed title.—These proceedings are limited to reaching property conceded to belong to the debtor, and money due to the debtor, when the order for examination is made. *Lock v. Mabbitt*, 2 Keyes, 457. When the title to the property is in dispute, the judge has no right to try in this summary manner the conflicting claims. *Manice v. Smith*, 5 Week. Dig. 255. In such case the property must be recovered in an action by the receiver. *Schrauth v. Dry Dock Sav. Bank*, 86 N. Y. 390. Section 2447 of the Code provides that an order for the delivery of property can only be made where the right to the possession of the property by a third person is not substantially disputed. Where it is doubtful who owes the debt to the judgment-debtor, a receiver should be appointed to enable the proper party to pursue the claim by action. *Corning v. Tooker*, 5 How. Pr. 16.

So where the amount of the indebtedness due from the third-person is either disputed or uncertain, or where there is any doubt as to the title to the property, a receiver should be appointed; so if the third-person claims an offset (*Grassmuck v. Richards*, 2 Abb. N. C. 359); or, if the third-person would incur a risk in making the payment. *Huntz v. McGehee*, 1 Law Bull. 3. Where a debt due the defendant in an action has been attached therein and by virtue of an order of the court obtained on behalf of the plaintiff, the amount of the debt has been paid by the debtor to the sheriff, who misappropriates the same, the plaintiff must bear the loss. *Matter of Dawson*, 110 N. Y. 114; 16 N. Y. St. Rep. 844. Where a third-person, examined as the judgment-debtor's debtor, holds a certain fund to the credit and account of the judgment-debtor which is claimed by a third person, he must disclose such fact to the judge, or he will not be protected against an action by such third person, by an order directing him to pay over the amount. *Wright v. Cabot*, 47 N. Y. Supr. 229; 89 N. Y. 570. In order to bar the rights of a party to money or property, ordered to be delivered to a sheriff or receiver under section 2447 of the Code of Civil Procedure, the party making such claim must

be made a party to the proceedings. *Schrauth v. Dry Dock Sav. Bk.*, 86 N. Y. 390. The only way a party paying money under an order, which is claimed by another, can protect himself is to resist payment and compel such third-party claimant to be made a party to the proceedings.

A judge has no jurisdiction to make a summary decision under section 2447 of the Code of Criminal Procedure, and direct a third person to pay over money in his possession alleged to belong to the judgment-debtor, where it is claimed by another than the judgment-debtor, who has brought an action to enforce its payment. *Waldron v. Walker*, 43 N. Y. St. Rep. 605; 18 N. Y. Supp. 292. In short, a judge has no jurisdiction to direct a third party to deliver over property of a judgment-debtor in his hands, unless the right to the possession of the property is substantially undisputed. *Hayes v. McClelland*, 20 Week. Dig. 393. The judge has no authority to decide the questions of indebtedness or ownership summarily, and compel the payment of money or delivery of property. *West Side Bank v. Pugsley*, 47 N. Y. 368. In order to give the judge jurisdiction to make an order, all the jurisdictional facts must be shown. Thus, the judge of one county has no power to order a third-person indebted to a judgment-debtor to pay over money in these proceedings, upon a judgment recovered before a justice of the peace of another county, and docketed only in the clerk's office of the former county, where the examination of such third person was had only upon an order of the county judge of the county in which the judgment was rendered, since there was no valid proceeding under section 2432, subdivision 3 of the Code, to reach such moneys. *Schenck v. Erwin*, 63 Hun, 104; 43 N. Y. St. Rep. 862.

9. **Lien on Fund.**—A junior execution creditor who first obtains an order in supplementary proceedings for the examination of a third person under section 2441, Code of Civil Procedure, and obtains an order directing the delivery by him to the sheriff for the creditor of a fund in his hands belonging to the debtor, thereby acquires a lien on the fund, and is entitled to satisfaction therefrom before a senior execution creditor. *Duffy v. Dawson*, 46 N. Y. St. Rep. 263.

III. WHAT PROPERTY CANNOT BE REACHED.

10. In general.—The property of a corporation created by or under the laws of the state, or a foreign corporation specified in section 1812 of the Code, cannot be reached in these proceedings. § 2463. Thus a third party cannot be examined as to the property of a judgment-debtor, where the judgment-debtor is a corporation created by the laws of this state. *Fitchburg Nat. Bk. v. Bushwick Chem. Works*, 13 Civ. Pro. Rep. 155.

11. Exempt property.—Section 2463 provides that these proceedings do not authorize the seizure of, or other interference with any property, which is expressly exempt by law from levy and sale by virtue of an execution, or the earnings of a judgment-debtor, for his personal services, rendered within sixty days next before the institution of the proceedings, when it is made to appear, by his oath or otherwise, that those earnings are necessary for the use of a family, wholly or partly supported by his labor. As a general rule, a male judgment-debtor has no exempt property, except such as is mentioned in sections 1390–1391 of the Code, and his earnings for his personal services under section 2463, and those are exempt only when he is a householder or has a family for which he provides. A woman need not be a householder, and her property has the same exemptions as a householder. § 1392. A householder is the master of a household, and a household is a family living together, but not necessarily wife and children, but it must be a family, small or large, for which he provides. To exempt the property or earnings of a male judgment-debtor, it must appear that he is a householder or a man having a family for which he provides.

Neither a right of action nor a judgment for damages for injuring, destroying or converting property exempt by law, can be reached. Thus, insurance money obtained for the loss or destruction of exempt property insured cannot be reached. *Andrews v. Rowan*, 28 How. Pr. 126. The law exempts the ordinary clothes and the necessary working tools of an unmarried male judgment-debtor. *Matter of Edlunds*, 35 Hun, 367. A pension granted by the United States for military service is exempt, so is property pur-

chased with such pension money. *Stockwell v. Nat. Bank of Malone*, 36 Hun, 583.

12. Trust funds created by a person other than the debtor.—Section 2463 exempts from these proceedings any money, thing in action, or other property held in trust for a judgment-debtor, where the trust has been created by, or the fund so held in trust has proceeded from; a person other than the judgment-debtor. The rule laid down in *Williams v. Thorn*, 70 N. Y. 270, is not changed by sections 1879, 2463 of the Code. *McEroy v. Appleby*, 15 Week. Dig. 233. It seems that a receiver cannot maintain an action to reach any surplus income coming to the judgment-debtor, under a trust created by a person other than the judgment-debtor. The power to proceed against the trust fund is confined to the judgment-creditor, who must proceed by direct action. *Levey v. Bull*, 47 Hun, 370; *Mannings v. Evans*, 19 id. 500; *De Camy v. Dempsey*, 10 Civ. Pro. Rep. 210; *Thompson v. Thompson*, 52 Hun, 456. Moneys received by a widow of a policeman from the police pension or insurance fund, is in the nature of a trust, and the fund proceeds from persons other than the judgment-debtor, and cannot be diverted by means of these proceeds and turned over to creditors. *Sargent v. Bennett*, 3 How. N. S. 515.

13. Earnings when exempt.—While it is held that only such earnings are exempted as have been earned within sixty days previous to the date of the granting or refusing of the order, requiring such earnings to be applied to the satisfaction of the judgment. *Bush v. White*, 12 Abb. 21. The rule is that anything earned or obtained after the granting of the order for examination cannot be reached by these proceedings. The term "personal services" includes earnings derived from a business conducted by the judgment-debtor where his services are the chief factor in it. *McSkinan v. Knowlton*, 20 Civ. Pro. Rep. 274; *Sanford v. Gordwin*, id. 276. The use of "personal earnings" of a judgment-debtor for sixty days prior to the commencement of the proceedings, is not a violation of an order of injunction served with the order for examination. *Hancock v. Sears*, 93 N. Y. 79. The judge before whom a debtor is examined has no authority to make an order requiring the debtor to pay the amount of the judgment out of an installment of

salary, which the debtor has not in his possession at the time the proceedings were instituted. *Columbian Institute v. Cregan*, 11 Civ. Pro. Rep. 87. Nor has the court any authority to make an order directing the debtor to set apart a portion of his salary each month as it becomes due, and apply it to the judgment until it is paid. Salary to become due to employees cannot be reached in any case, and this is particularly so with regard to public officers, who cannot by any act of theirs assign or encumber the future salary of their office, nor can the court encumber or assign it for them.

14. *Alimony*.—Alimony awarded to a wife cannot be regarded as an ordinary debt due by one person to another, which may be reached by judgment-creditors in the ordinary way. It is not the wife's property nor her separate estate. It is simply a provision for her support, still it should be charged with a debt contracted by her for necessities. *Romaine v. Chauncey*, 60 Hun, 477; 39 N. Y. St. Rep. 480.

IV. APPLICATION OF MONEY OR PROPERTY TO PAYMENT OF JUDGMENT.

If the sheriff does not hold an execution upon the judgment against the property of the judgment-debtor, he has the same rights and powers, and is subject to the same duties and liabilities, with respect to the money or property received by him under an order made as prescribed by either section 2446 or 2447 of the Code of Civil Procedure, as if the money had been collected or the property levied upon by him by virtue of such an execution. Code, § 2448. That is, when it required the payment of a sum of money towards the satisfaction of the judgment, the sheriff pays the money directly to the creditor. If the property consists of evidences of debt, the order should direct as to its collection or sale. If a receiver has been appointed, or a receivership has been extended to the special proceeding, the judge must, by order, direct the sheriff to pay the money or the proceeds of the property, deducting his fees, to the receiver, or if the case so requires, to deliver to the receiver the property in his hands.

If the order directs the sheriff to apply the property upon

an execution in favor of the judgment-creditor issued either before or after the payment or delivery to the sheriff, the sheriff levies upon and sells the personal property upon the execution. Code, § 2449. A judgment creditor who obtains an order for examination, and an order for the delivery of property, acquires a lien on the property, and is entitled to priority of satisfaction over a senior execution-creditor. *Duffy v. Dawson*, 19 N. Y. Supp. 186.

Where property is delivered to a sheriff or receiver, as prescribed by section 2447 of the Code, and the proceeding is discontinued or dismissed, or the judgment is satisfied, without resorting to the money or property so delivered, or a balance of the money, or of the proceeds of the property, or a part of the property remains in the sheriff's or the receiver's hands, after the satisfying the judgment, the costs and expenses of the proceeding, the judge must make an order directing the sheriff or receiver to pay the money, or deliver the property so remaining in his hands, to the judgment-debtor, or to such other person as appears to be entitled thereto, upon payment of his fees, and all other sums legally chargeable against the same. Code, § 2450. It would seem that unless the words "legally chargeable against the same" qualifies the words "upon payment of his fees," that part of the said section would be unconstitutional in many cases that would arise under it.

CHAPTER XV.

I. SUPERSEDING ; VACATING ; DISCONTINUING OR DISMISSING PROCEEDINGS.	V. IRREGULARITIES AND ANNULITIES.
1. When not superseded.	4. In general.
II. VACATING ORDER.	5. Irregularities.
2. In general.	6. When must be made to set aside.
3. Grounds of motion.	7. Waiver.
III. DISCONTINUANCE.	8. Notice of motion on ground of irregularity.
IV. DISMISSAL.	9. Amendable.
	10. Nullities.

I. SUPERSEDING ; VACATING ; DISCONTINUING ; DISMISSING PROCEEDINGS.

1. **When not superseded.**—An order for the examination of a debtor is not superseded by a second order to examine him as to property obtained by him subsequent to the first order. *Walter v. Pecare*, 32 N. Y. St. Rep. 841. But it is different where the second order is made for the same object as the first. To justify superseding the original order for the examination of a third person, under section 2441 of the Code, it is necessary to prove that after it was allowed, something occurred which changed the rights of the parties and called for another kind of disposition of the matter finally, and the mere fact of the return of the execution, after the granting of the order, is insufficient. *Lingsweiler v. Lingsweiler*, 29 N. Y. St. Rep. 354.

II. VACATING ORDER.

2. **In general.**—The remedies in supplementary proceedings are original in their character, and intended as a substitute for an action in the nature of a creditor's bill the order or warrant for examination with the affidavit served with it taking the place of a summons and complaint, and such proceedings should not be dismissed, when properly instituted, except for the most substantial reasons. But supplementary proceedings are special proceedings, and are to be strictly followed, and if the affidavit or proof upon which the order is founded, fails to allege all the facts prescribed by the statute, the proceedings may be vacated upon

a motion duly made upon notice to the judgment-creditor, in the same manner that a complaint in an action that fails to state a cause of action, may be dismissed. By section 2433 of the Code, it is declared that an order made in the course of the proceedings can only be reviewed in the way and manner therein provided, which is as follows: "An order made by a judge out of court, may be vacated or modified by the judge who made it, as if it were made in an action, or it, or the order of the judge vacating or modifying it, may be vacated or modified, upon motion by the court out of which the execution was issued." No power is here given to the judge to vacate or modify an order previously made by him on an *ex parte* application. The provisions of section 772 of the Code, which permits a judge, in particular instances, to vacate or modify orders previously granted by him without notice to the adverse party do not apply to these proceedings, as they relate to orders granted in actions before final judgment. *Dorsey v. Cummings*, 15 N. Y. St. Rep. 459. In *Bassett v. Wheeler*, 84 N. Y. 466, it was held to be competent for a person against whom supplementary proceedings have been instituted *ex parte*, to move, on motion, for a dismissal of the order for his appearance and examination on the ground that it was improvidently granted. A motion to vacate these proceedings is made upon notice, and either upon the papers, upon which the orders were obtained, or upon affidavits served with the notice of motion or order to show cause. It was held in *Moschell v. Boor*, 50 N. Y. St. Rep. 238, that an order appointing a receiver in these proceedings,—though granted on a contested motion—is not appealable. That an order, made in the course of these proceedings proper, can be reviewed only as follows :

1. An order made by a judge out of court may be vacated or modified by the judge who made it, as if it were made in an action, or it, or the order of the judge vacating or modifying it, may be vacated or modified upon motion by the court out of which the execution was issued. The practitioner, however, must not lose sight of the fact that proceedings for contempt are themselves special proceedings, independent of the action or special proceeding in which they may be taken, and an order made therein can-

not be regarded as an order made in the original proceedings.

3. Grounds of motion.—A defendant who was served with summons under a wrong name, and did not appear, may raise the question of jurisdiction, though he has not appealed from the judgment. *McGill v. Weill*, 19 Civ. Pro. Rep. 43; 10 N. Y. Supp. 246. Where the facts disclosed by the affidavit for an order for examination are not such as to make a case within the statute, the proceedings will be set aside on motion. *Sackett v. Newton*, 10 How Pr. 560.

Thus, where a judgment has been obtained in a justice's court and the execution was not issued by a county clerk, the order will be vacated on motion made upon notice. *Gray v. Lieben*, 8 Civ. Pro. Rep. 48. So the discharge of a bankrupt in composition proceedings is a good ground for vacating an order made prior to said discharge. *Leo v. Joseph*, 9 N. Y. Supp. 612; *Smith v. Paul*, 20 How. Pr. 97; *Coursen v. Dearborn*, 7 Robt. 143; *World Co. v. Brooks*, 7 Abb N. S. 212. An order will be vacated where the affidavit on which it is founded does not state the amount then unpaid on the judgment. *Douglass v. Mainzer*, 40 Hun, 75. So will an order founded on an affidavit that states the facts in the alternative, or in the words of the statute. *Collins v. Beebe*, 54 id. 318; *Amot v. Wright*, 55 id. 561. So where an affidavit does not truly describe the judgment. *Kennedy v. Weed*, 10 Abb. 62. So where an affidavit executed by one in no way a party to the record does not show that the proceedings are authorized by the judgment-creditor. *Brown v. Walker*, 28 N. Y. St. Rep. 36; *Lindsay v. Sherman*, 5 How. Pr. 308. The order must state all the facts necessary to confer jurisdiction, otherwise it may be set aside on motion. *Day v. Brosman*, 6 Abb. N. C. 312. A party is not justified in disobeying an order because it is erroneous. The objection that the proceedings were not brought in time must be raised on motion. *Bolt v. Hauser*, 33 N. Y. St. Rep. 344; *McGuire v. Hudson*, 41 id. 295. Although the court of appeals, in *Conyngham v. Duffy*, 34 N. Y. St. Rep. 736, has settled the question as to the time in which proceedings under section 2435 of the Code of Civil Procedure must be commenced, there does not seem to be any limit to the time in which proceedings can be com-

menced under section 2436 of the Code of Civil Procedure, and other proceedings commenced after the issuing and before the return of an execution. Code Civ. Pro., §§ 414, 415 and 3352. It seems that on a return of an order or warrant for examination the judge at chambers, before whom the order is returned, may vacate it on motion of the summoned party, if the affidavit on which it is founded is insufficient, or if for any reason it appears to have been improvidently granted. *Courtois v. Harrison*, 12 How. Pr. 359.

The order for examination of a judgment-debtor before return of execution under section 2436 of the Code will be vacated on motion, where the affidavit or proof on which it is predicated does not show that a demand of the application of the property to the payment of the judgment had been made upon and refused by the judgment-debtor. *First Nat. Bank v. Wilson*, 13 Hun, 232; *Levi v. Beacham*, 18 N. Y. Supp. 748. So, where the affidavit fails to show that the execution was issued within the five years allowed by section 1375 of the Code, or, if after the expiration of five years, that an execution had been issued within that time, or that the execution on which the proceedings are founded was issued pursuant to the order of the court granted under section 1377. *Hutson v. Weld*, 38 Hun, 142. So where the affidavit states that deponent is informed and believes that defendant has property which he unjustly refuses to apply to the satisfaction of the judgment, the proceedings will be vacated on motion unless the affidavit also gives the name of the affiant's informant, with his means of knowledge. *Bowery Bank v. Widmayer*, 9 N. Y. Supp. 629; *Manken v. Pape*, 65 How. Pr. 453.

A warrant of arrest against a non-resident debtor will be vacated unless the affidavit shows what property he has, or, at least, that he has property. *Weller v. De Leon*, 26 N. Y. St. Rep. 102; *Denning v. Schieffelin*, 26 id. 96. Where the warrant is issued after an order for examination as allowed by section 2438 of the Code, the vacating of the order does not require the vacating of the warrant. *Frost v. Craig*, 30 N. Y. St. Rep. 848.

A notice of motion to vacate an order or warrant must specify the irregularities to which the motion is pointed.

Id. An order for the examination of the debtor of the judgment-debtor will be vacated on motion, where the averments in the affidavit on which it is founded, that he has money or property of the judgment-debtor, etc., are only on information and belief, without stating the sources of information. *People v. Jones*, 1 Abb. N. C. 172; *Fleming v. Tourgee*, 40 N. Y. St. Rep. 705. So where the affidavit states in the alternative form, that a third person has property of the judgment-debtor, or is indebted to him. *Collins v. Beebe*, 27 id. 4.

And where the affidavit states that the execution was issued to a county where the judgment-debtor then resided and yet resides, or has * * * an office for the regular transaction of business, and on information and belief that the third person has property of the judgment-debtor exceeding ten dollars in value, or is indebted to him in such sum, the order will be set aside upon motion. *Leonard v. Bowman*, 40 N. Y. St. Rep. 135.

III. DISCONTINUANCE.

Supplementary proceedings like an action continue until an order is entered discontinuing or dismissing them.

Section 2454 of the Code of Civil Procedure provides that these proceedings may be discontinued by the party instituting them, at any time, by leave of the judge before whom the proceedings are pending. But in order to obtain leave of the judge, the creditor must make a motion upon notice to the parties interested in the proceedings, and the order must be made upon such terms as justice requires. After the service of an order or warrant in these proceedings, they will be pending until some order is entered, discontinuing or dismissing them. *Underwood v. Sutcliff*, 10 Hun, 453; *Stanley v. Lovett*, 14 id. 412; *Keihen v. Shipherd*, 24 N. Y. St. Rep. 739. But see *Bennett v. McGuier*, 58 Barb. 625; *Schenck v. Conover*, 56 How. Pr. 437.

IV. DISMISSAL.

Where the judgment-creditor unreasonably neglects or delays to proceed, or where it appears that his judgment has been satisfied, the judgment-debtor, or a plaintiff in a judgment-creditor's action against the debtor, or a judg-

ment-creditor who has instituted either of the proceedings under sections 2435, 2436, 2437 or 2441 of the Code of Civil Procedure, may make a motion, to the judge before whom the proceedings are pending, upon notice to all persons interested, and obtain an order dismissing the proceedings. Code Civ. Pro., § 2454.

V. IRREGULARITIES AND NULLITIES.

4. In general.—An irregularity consists in the doing of some act at an unreasonable time, or in an improper manner, as in omitting to do something that is necessary for the due and orderly conduct of the proceedings. It may, therefore, properly be defined to be a want of adherence to some prescribed rule or mode of proceeding and may arise in every stage of the proceeding, from the granting of the order to the discharge of a receiver.

There is a substantial distinction between defects which constitute irregularities, and those that render the proceedings a total nullity. Where the proceeding adopted is that prescribed by the Code of Civil Procedure, or rules of practice, and the error is merely in the manner of conducting it, such an error is an irregularity, and may be waived by the laches or subsequent acts of the opposite party. But where the proceeding itself is altogether unwarranted, totally dissimilar to that which the law authorizes, then the proceeding is a nullity, and cannot be made regular by any act of either party. *Roberts v. Spurr*, 3 Dowl. P. C. 551.

5. Irregularities.—Irregularities are divided into two classes, those which affect the merits and those which do not. Where any necessary proceeding has been omitted by the plaintiff his next subsequent proceeding may be set aside for irregularity. As if the judgment-creditor proceed to the examination of witnesses before the referee has taken the oath prescribed by section 2445 of the Code, the testimony so taken may be set aside and a new examination granted, and if any necessary proceeding on the part of the judgment-creditor be had either before or subsequent to the time prescribed by the Code it may be set aside for irregularity. So if such proceeding be informal, or not conducted in the manner prescribed by the Code or the rules of practice, it may be set aside for irregularity.

Thus, the service of the order for examination by the judgment-creditor himself, the commencement of the examination before the time fixed by the order of the judge or the summons of the referee. If all the facts exist which are necessary to vest a judge with jurisdiction in proceedings under either sections 2435, 2436, 2437 or 2441, he will acquire jurisdiction of the judgment-debtor's person and of the subject-matter of the proceedings, either by the proper proof of the necessary facts and the due service of the order made upon such proof, or by the debtor's voluntary appearance and submission to the control of the judge, for by so doing he admits to the officer the existence of all the requisite facts, and is as fully bound to obey every subsequent order of the judge as if he had been originally brought before him by an order based upon a proper affidavit. *Viburt v. Frost*, 3 Abb. 119; *Underwood v. Sutcliff*, 10 Hun, 453; *Hart v. Johnson*, 43 id. 505. But jurisdiction cannot be given by consent. *Schenck v. Erwin*, 38 N. Y. St. Rep. 603; *McGuire v. Hudson*, 41 id. 295; *Fleming v. Tourgee*, 40 id. 705; *Leonard v. Bowman*, id. 135; *Brown v. Walker*, 28 id. 36; *Arnot v. Wright*, 29 id. 425; *Bowery Bank v. Widmayer*, 9 N. Y. Supp. 629. It is a general rule that no one but a party who has been injuriously affected by an irregularity can properly apply for relief against it. *Oakley v. Becker*, 2 Cow. 454; *Bacon v. Cropsay*, 7 N. Y. 195.

6. When motion must be made to set aside.—A person affected by an irregularity must move at the first opportunity after he has knowledge of the fact and before any further proceedings have been taken in the action to set it aside. *Mayor, etc., of New York v. Lyons*, 24 How Pr. 280.

If a party takes subsequent steps in the cause he waives the irregularity and cannot afterwards object to it. The same rule prevails where a party, with knowledge of the irregularity, remains passive and allows the other party to take a subsequent step. If there has been any delay to object to a mere irregularity the delay must be excused before applying for relief. *Lawrence v. Jones*, 15 Abb. 110.

But what constitutes a reasonable excuse is addressed to the discretion of the judge or court, and depends upon the particular circumstances of each case. An order cannot

be disregarded on the ground that it is irregular because such an order is only voidable, but it is different if the order is null and void.

7. Waiver—A waiver consists in the doing of some act after an irregularity has been committed. Any defect which does not deprive the court of jurisdiction may be waived, and such irregularity is waived by neglecting to object in due season. *Fulton Bank v. Beach*, 6 Wend. 36. But a want of knowledge of the irregularity against which relief is sought, is always an excuse for delay in moving to set aside the irregular proceedings, and so far it may be said that there can be no waiver of an irregularity until the irregularity is known to the party affected. *Wolford v. Orkley*, 43 How. Pr. 118.

It rests upon the party objecting to show the want of knowledge as an excuse for delay. It seems that appearance in obedience to void process, without knowledge that the process is void, will be construed as a waiver of the defect. *Wright v. Jeffrey*, 5 Cow. 15; *Pixley v. Winchell*, 7 id. 366.

8. Notice of motion on the ground of irregularity.—The notice of motion or order to show cause upon an application to set aside a proceeding for irregularity must specify the irregularity complained of. *Perkins v. Mead*, 22 How. Pr. 476. And where there are several grounds of irregularity they must all be stated, or those not stated will be waived. *Brooks v. Schultz*, 3 Abb. N. S. 124. The notice of motion must be supported by affidavits showing the defect.

9. Amendable.—In general, any mere irregularity, of whatever nature, is amendable under specific conditions, with the exception of an irregularity in an affidavit, which cannot be amended. *Clickman v. Clickman*, 1 N. Y. 611. An absolute nullity, or any proceeding which is in itself void, cannot be amended. *Grant v. Vandercook*, 57 Barb. 165. Thus, if the judge has not obtained jurisdiction of the matter by the proper service of the order he has no power to amend the proceedings by which the judgment-creditor seeks to give him jurisdiction.

Under the Code of Civil Procedure the court or judge may in furtherance of justice, and on such terms as may

be proper, amend any process or proceeding by correcting any mistake in any respect. *Talcott v. Rosenberg*, 8 Abb. N. S. 287.

An order for examination may be amended by leave of the judge on motion. *Wakenshaw v. Pirzel*, 32 How. Pr. 310. A defect in the substance of an affidavit may be supplied by a supplemental affidavit (*Depew v. Leal*, 2 Abb. 131), but cannot be corrected by amendment. *Clickman v. Clickman*, 1 N. Y. 611. But since the last decision was made it has been the rule to amend affidavits. *Lawton v. Reil*, 34 How. Pr. 465.

10. Nullities.—Any proceeding which is wholly unwarranted and unauthorized by law is a nullity, and cannot be made valid by any act of the parties. *Hunt v. Wallis*, 6 Paige, 371. And no mere delay in taking objection to a defect which renders a proceeding an absolute nullity will be construed as a waiver. *Titus v. Relyea*, 16 How. Pr. 371; *Phelps v. Baker*, 41 id. 237. Thus, appearance does not waive a jurisdictional defect relating to the subject-matter of the proceeding.

It is a well-settled principle that if the judge has failed to acquire jurisdiction by the service of the order of examination he cannot gain it by any delay on the part of the judgment-debtor or third person in raising an objection to the validity of the proceedings. *Titus v. Relyea*, 16 How. Pr. 371. While consent may confer jurisdiction over the person of the judgment-debtor or third party, it cannot confer jurisdiction over the subject-matter. *Dudley v. Mayhew*, 3 N. Y. 9; *King v. Pool*, 36 Barb. 242. A restricted or limited appearance for the purpose of objecting cannot be construed as a waiver of any defect. *Seymour v. Judd*, 2 N. Y. 464.

CHAPTER XVI.

COSTS.

I. OF COSTS IN GENERAL.

1. Judgment-creditor entitled to.
—When.

2. How collected.

II. COSTS TO JUDGMENT-DEBTOR OR
THIRD PERSON.

I. OF COSTS IN GENERAL.

1. Judgment-creditor entitled to.—When.—The judge may make an order allowing to the judgment-creditor a fixed sum as costs, not exceeding thirty dollars, and in addition to that the disbursements of the proceedings to be taxed by the judge or county clerk. Code Civ. Pro. § 2455.

Costs in these proceedings, like costs in an action, cannot be allowed a party until the proceedings are terminated as to him in his favor. *Davis v. Turner*, 4 How. Pr. 194. The disbursements should be taxed upon notice by the clerk of court or by the judge before whom the proceedings are pending. *Foley v. Rathbone*, 12 Hun, 589. The provisions of sections 2455 and 2456 of the Code relate to costs in the proceedings, and have no application whatever to the costs of a motion to dismiss it. *Hutson v. Weld*, 38 Hun, 142. Where the proceedings are under section 2441 of the Code, the judge may grant costs against the judgment-debtor. *Grinnell v. Sherman*, 33 N. Y. St. Rep. 27. Costs may be allowed to the judgment-creditor, although the debtor pays the amount due, and therefore no examination is had. *Colne v. Girard*, 19 Abb. N. C. 288.

2. How collected.—Section 2455 of the Code provides that the order granting costs must direct the payment thereof out of any money which has come, or may come, to the hands of the receiver or of the sheriff; or, within a time specified in the order, by the judgment-debtor, or other person against whom the special proceeding is instituted. It was held in *Valienle v. Bryan*, 3 Civ. Pro. Rep. 358, that the thirty dollars costs, etc., are not collectable by execution for the reason that the Code has prescribed a method of collection. The Code directs the payment of the costs out of

any money which has come, or may come, to the hands of the receiver or of the sheriff. The Code then provides that the order may direct that the judgment-debtor or other person against whom the special proceedings are instituted pay said costs within a time therein specified. The payment directly by the judgment-debtor or other persons, as directed in the order, must be enforced by proceedings for contempt. Thus, the order for the payment of costs directly by the debtor or third person must be personally served upon the party against whom it is made, and a demand duly made of such party for the payment of the costs. If the party neglects to pay said costs within the time stated in the order, then the creditor must apply to the judge who granted the order or to the court out of which the execution was issued for an order of attachment. This application must be made on notice to the party for the punishment of whom the application is made.

II. COSTS TO JUDGMENT-DEBTOR OR THIRD PERSON.

Section 2456 of the Code provides that when the judgment-debtor, or other person against whom the special proceeding is instituted, has been examined, and property applicable to the payment of the judgment has not been discovered in the course of the special proceedings, the judge may make an order allowing him thirty dollars and disbursements, and directing the payment thereof within a time specified in the order by the judgment-creditor, except when it is allowed to the judgment-debtor out of any money which has come to the hands of the receiver or of the sheriff. Where such costs are allowed to the judgment-debtor they should be deducted from the judgment, as a creditor who has not been guilty of bad faith should not be compelled to pay money to his debtor. *Kress v. Morehead*, 8 N. Y. St. Rep. 858. But a third party, examined in supplementary proceedings under section 2441 of the Code, should be allowed full costs where property applicable to the payment of the judgment has not been found in the course of those special proceedings, unless the creditor shows good reason for the examination. *Anon 1*, Code Rep. N. S. 113; *Sloane v. Higgins*, 2 Law Bull. 11; *Anon 11*, Abb. 108.

CHAPTER XVII.

RECEIVERS.

I. RECEIVERS IN SUPPLEMENTARY PROCEEDINGS.	II. EXTENSION OF RECEIVERSHIP.
1. In general.	III. COMPLETING RECEIVERSHIP.
2. Appointment before service of order for examination.	10. Filing order.
3. Appointment without notice to the judgment-debtor.	11. Security.
4. Before return of execution.	IV. WHAT PROPERTY VESTS IN RECEIVER.
5. Who may act as receivers.	12. In general.
6. By whom appointed.	13. From what time absolute title vests.
7. Notice of application for.	14. Property acquired after service of order for examination.
8. Grounds for appointing.	15. Real estate—Title of receiver in.
9. Proof as to pendency of other proceedings.	

I. RECEIVERS IN SUPPLEMENTARY PROCEEDINGS.

1. In general.—The appointment of a receiver in proceedings supplementary to execution is an order made in the course of such proceedings, and is reviewable only under section 2433 of the Code of Civil Procedure. *Moscicell v. Boor*, 50 N. Y. St. Rep. 238.

2. Appointment before service of order for examination.—Section 2464 of the Code provides that “at any time after making the order requiring the judgment-debtor or any other person to attend and be examined, or issuing a warrant, the judge to whom the order or warrant is returnable may make an order appointing a receiver of the property of the judgment-debtor, and subdivision 2 of section 2469 provides that where an order or warrant has not been served for the examination of the judgment-debtor, or other person, but an order has been made requiring a person to attend and be examined concerning property belonging, or a debt due, to the judgment-debtor, the receiver’s title extends to the personal property belonging to the judgment-debtor which was in his hands or under the control of the person or corporation thus required to attend at the time of the service of the order, and to a debt then due to him from that person or corporation.

Subdivision 1 of section 2469 provides for cases only where an order or warrant for examination has been served, before the appointment of a receiver. Thus, the Code provides for the appointment of a receiver after the granting of an order or warrant for the examination of the judgment-debtor or a third person, under either sections 2435, 2436 or 2441. *DeVivier v. Smith*, 6 Civ. Pro. Rep. 394.

3. Appointment without notice to the judgment-debtor.—Where the order to attend and be examined, or the warrant has been served upon the judgment-debtor, a receiver may be appointed upon the return day thereof, or at the close of the examination, without further notice to him. So where the judge is satisfied that the judgment-debtor cannot, with reasonable diligence, be found within the state, and the order recites that fact, and that notice is dispensed with, personal notice of application for the order need not be served upon the judgment-debtor. Code, § 2464.

4. Before return of execution.—A receiver may be appointed at any time after the issuing of an execution, as prescribed in section 2458 of the Code, and before the return thereof; and where an order or warrant is issued as prescribed in section 2436 or 2437. What was said in *First Nat. Bank of Canandaigua v. Martin*, 18 N. Y. St. Rep. 414, as to the exhaustion of the creditor's remedy by execution, was not before the court and was not passed upon.

But in *Albany Nat. Bank v. Gaynor*, 67 How. Pr. 421, the court say: "The debtor will not be directed to deliver to a receiver possession of real property by which the judgment is a lien, the remedy is by sale under execution.

5. Who may not act as receiver.—No person shall be appointed a receiver who is not a resident of this state, nor shall any person continue to act as such receiver after he ceases to be a resident thereof, and the judgment-creditor may apply to the court or judge that appointed such receiver, within thirty days after such receiver ceases to be a resident of this state, for the appointment of another person in his place, upon such notice to the persons interested as the court or judge may direct. Code, § 2469, subd. 5; *Chamberlain v. Greenleaf*, 4 Abb. N. C. 92.

6. By whom appointed.—Any judge who has jurisdiction to entertain supplementary proceedings has the power to

appoint a receiver. *Hyatt v. Dusenbury*, 5 N. Y. St. Rep. 849. The Code provides that the order must be made by the judge to whom the order or warrant for examination is returnable. *Terry v. Bange*, 24 id. 599 ; Code, § 2464. Section 2462 of the Code provides that section 26, 52 and 279 apply to all supplementary proceedings, and the judge before whom a proceeding is continued is deemed to be the judge to whom an order or warrant is returnable, for the purpose of any provision of supplementary proceedings, or the appointment of a receiver, or any proceedings by or against a receiver. The order for the appointment of a receiver must be a chamber order. *Ball v. Goodenough*, 37 How. Pr. 479.

7. Notice of application for.—Except in the cases provided for in the last paragraph of section 2464 of the Code, at least two days' notice of the application for the order appointing a receiver must be given personally to the judgment debtor, unless the judge is satisfied by the proof before him that he cannot with due diligence, be found within the state, in which case the order must recite that fact, and may dispense with notice, or may direct notice to be given in any manner which the judge thinks proper. Failure to give the two days' notice prescribed by the Code is an irregularity for which the order should be set aside. *Strohn v. Epstein*, 6 Civ. Pro. Rep. 36 ; 14 Abb. N. C. 322. Thus, the order cannot be made upon the examination of a third party under section 2441, without the two days' notice to the judgment-debtor. But where the order recites that the judgment-debtor is a non-resident of the state, and that personal service of the notice cannot be made, and dispenses with notice, the order will be regular. *O'Connor v. Mechanics' Bank*, 54 Hun, 272. It seems that notice of an application to extend a receivership must be given to the judgment-debtor, the same as on an original application for a receiver. *Benjamin v. Meyers*, 3 N. Y. St. Rep. 284 ; *Thayer v. Dempsey*, 25 Week. Dig. 457. In *Sayles v. Best et al.*, 49 N. Y. St. Rep. 460, 461, the court say : " An order appointing a receiver in supplementary proceedings without personal service of notice on the judgment-debtor is void," and in *Terry v. Bange*, 24 id. 599, the court say :

“Notice to the judgment-debtor is not a condition precedent to the exercise of the power to appoint a receiver.

8. Grounds for appointing.—A receiver is appointed very much as a matter of course in supplementary proceedings. Code, § 2464 ; *Hoyt v. Mann*, 7 N. Y. St. Rep. 420. Thus, where there is a controversy as to title to property claimed to belong to the debtor, a receiver will be appointed. *Dickinson v. Onderdonk*, 18 Hun, 479, and it is no answer to an application for a receiver that the examination has not shown the debtor to be the owner of any property. *Myers case*, 2 Abb. 476. A creditor, however, has not an absolute right to have a receiver appointed, but the appointment vests somewhat in the discretion of the court. In the *Matter of Edlunds*, 35 Hun, 367, it seems that a receiver will not be appointed for the purpose of taking and selling the judgment-debtor's real estate ; the only way that the receiver can sell such real estate is by an execution, and the judgment-debtor is entitled to his fifteen months in which to redeem after any sale. *Bunn v. Daly*, 24 Hun, 526 ; *Tinkey v. Langdon*, 60 How. Pr. 180 ; *Ashley v. Turner*, 22 Hun, 226.

In 1892, section 2449 of the Code was amended by adding: “And a receiver may, on leave of a judge having power to appoint such receiver, lease the real property that shall come to his possession for such time as shall be necessary to realize moneys sufficient to satisfy the judgment, with interest thereon, and costs of the special proceedings.”

In *Matter of Edlunds*, 35 Hun, 367, the court say: “The examination of the defendant disclosed no property, except a cheap watch and chain, and a trunk and some clothing. The judgment-debtor is a clothing cutter and an unmarried man, but certainly he is entitled to all tools and implements necessary for his occupation, of which a watch may well be one. There is nothing to receive, and no occasion for a receiver.” But ordinarily the question of property is not material. *De Camp v. Dempsey*, 10 Civ. Pro. Rep. 210.

9. Proof as to pendency of other proceedings.—Section 2465 of the Code provides that “The judge must ascertain, if practicable, by the oath of the judgment-debtor or otherwise, whether a creditor's action or another proceeding supplementary to execution, is pending against the judgment-

debtor, and if either is pending and a receiver has not been appointed therein, notice of the application for the appointment of a receiver, and of all the subsequent proceedings respecting the receivership, must be given, in such a manner as the judge directs, to the judgment-creditor prosecuting it." *State Bank of Syracuse v. Gill*, 23 Hun, 410.

II. EXTENSION OF RECEIVERSHIP.

Section 2466 of the Code provides that only one receiver of the property of a judgment-debtor shall be appointed.

This section applies only to supplementary proceedings and not to actions brought by judgment-creditors. *State Bank of Syracuse v. Gill*, 23 Hun, 410. Where the receiver of the property of a judgment debtor has already been appointed, the judge, instead of appointing another one must make an order extending the receivership to the proceeding before him.

The same reason for giving notice to the judgment-debtor, applies with equal force to an application extending a receivership. *Benjamin v. Myers*, 3 N. Y. St. Rep. 284. The court, in a creditor's action, may appoint a second receiver, and direct the receiver appointed in supplementary proceedings to hand over the judgment-debtor's property to him. *Connolly v. Kretz*, 78 N. Y. 620. After a receiver is appointed, he is subject to the direction and control of the court out of which the execution was issued. Where an order has been made, extending the receivership to a special proceeding founded upon a subsequent judgment, the control over and direction of the receiver with respect to the judgment, remains in the court to whose control and direction he was originally subject. Code, § 2471. Thus, where a receiver is appointed upon a judgment of the county court, and the receivership is extended over another proceeding, upon a judgment in the supreme court, the supreme court cannot remove the receiver and appoint another in his place. *The Garfield Nat. Bank v. Bostwick*, 39 N. Y. St. Rep. 358. But an order extending a receivership gives to the judgment-creditor the same rights as if a receiver was then appointed upon his application, including the right to apply to the court to control, direct or remove the receiver, or to subordinate the proceedings in or by which the

receiver was appointed, to those taken under his judgment. Code, § 2466. Thus, if while proceedings are pending on a judgment in favor of A., B. commences proceedings and has a receiver appointed, A. cannot have another receiver appointed in his proceedings, but he may have the receivership extended to his judgment, and then move to have B.'s proceedings subordinated to his.

The extension of the receivership makes the title of the receiver relate back to the time when the order in A.'s proceeding was served for the benefit of A. *Webb v. Osborne*, 15 Daly, 406. It seems that the proceedings by B. for the appointment of a receiver must have been made after notice to A. as required by section 2465 of the Code. If such notice was not given, the order appointing the receiver was irregular if not void. *Youngs v. Klunder*, 27 N. Y. St. Rep. 32.

The fund in the hands of a receiver is not there for the benefit of any particular judgment-creditor. It is in *custodia legis* for those creditors who establish a right to it according to the respective priorities of their liens.

While it is true that funds in the hands of a receiver are in *custodia legis* for those creditors who establish a right to it, the court has no power, without personal notice to the judgment-debtor, to make an order directing a receiver to apply any portion of the funds coming to his hands in payment of judgments other than that under which he was appointed, or to those to which his receivership has been extended. It is his duty to restore to the judgment-debtor any surplus after the satisfaction of these judgments, and such an order made without notice to the debtor is not binding upon him, and would be no protection to the receiver. *Goddard v. Stiles*, 90 N. Y. 199.

III. COMPLETING RECEIVERSHIP.

10. **Filing order.**—Each county clerk must keep in his office a book, indexed to the name of the judgment-debtors, styled "Book of orders appointing receivers of judgment-debtors." The county clerk must file all orders for the appointment of receivers immediately upon receiving them, and must record them in the book so kept. For each omission to file and record, a county clerk forfeits to the party

aggrieved, two hundred and fifty dollars, etc. Code, § 2470. An order appointing a receiver, or extending a receivership, must be filed in the office of the clerk of the county wherein the judgment-roll in the action upon the judgment of which the proceedings are founded, or, if the proceeding is founded upon an execution issued out of a court, other than that in which the judgment was rendered, in the office of the clerk of the county wherein the transcript of the judgment is filed. Code, § 2467. The appointment of the receiver is not complete until the order and the undertaking required thereby are properly filed. *Barnther v. Brosche*, 19 Civ. Pro. Rep. 466; *Johnson v. Martin*, 1 S. C. (T. & C.) 504.

The personal property of the judgment-debtor vests only in the receiver from the time of filing the order or a certified copy thereof, in the county where he resides. *Nicoll v. Spowers*, 105 N. Y. 1. But when the orders are duly filed, the receiver is vested with the legal title to all the personal property of the judgment-debtor and has the further right to prosecute actions to set aside all transfers of property made by the debtor to defraud his creditors. *Mandeville v. Avery*, 124 id. 242; 36 N. Y. St. Rep. 338.

II. Security.—A receiver must, before entering upon his duties, execute and file with the clerk mentioned in section 2467 of the Code of Civil Procedure, a bond to the people with at least two sufficient sureties, in a penalty fixed by the judge making the appointment, conditioned for the faithful discharge of his duties as receiver; and the court mentioned in section 2471 of the Code of Civil Procedure, or the judge making the order, by or pursuant to which the receiver was appointed, or his successor in office, may, at any time, direct him to give a new bond, with new sureties, with the like conditions. Code, § 715. Where the order appointing a receiver requires a bond with one surety only, it is not for that reason, void, and it may be amended without prejudice. *Holmes v. McDowell*, 15 Hun, 585; 76 N. Y. 596.

Where the bond lacks a seal, it is an irregularity merely, (*Morgan v. Potter*, 17 Hun, 403); and if one of the sureties on a bond become insolvent, it is discretionary with the court whether to require the receiver to give new security. *Haulenbeck v. Heacock*, 47 N. Y. Supr. 533. It seems that

the sureties on a receiver's bond are not liable for any act of his before they executed the same. *Thompson v. McGregor*, 81 N. Y. 592.

IV. WHAT PROPERTY VESTS IN RECEIVER. . .

12. In general.—Where the order appointing a receiver or extending his receivership has been duly filed in the office of the clerk of the county where the judgment-debtor resides, and the receiver has given the security required by section 715 of the Code of Civil Procedure, the personal property of the judgment-debtor, except such as is exempted from these proceedings by section 2463 of the Code of Civil Procedure, is vested in him from the time of the filing of the order.

Real property is vested in the receiver, only from the time when the order or a certified copy thereof, as the case may be, is filed with the clerk of the county where it is situated. Code, § 2468; *First Nat'l Bank v. Martin*, 49 Hun, 571.

Thus, where a receiver was appointed and duly qualified, but the order was not filed in the county clerk's office for a year thereafter, the receivership was extended to a second proceeding, and the order of extension filed, and thereafter and before the first order was so filed, the judgment-debtor conveyed real estate, it was held that the real estate became vested in the receiver when the order of extension was filed, and the subsequent deed conveyed nothing. *Webb v. Osborne*, 27 N. Y. St. Rep. 792. A right of dower of a widow, though not admeasured, is an absolute right, which vests in the receiver. *Sayles v. Naylor*, 5 N. Y. St. Rep. 816.

13. From what time absolute title vests.—By section 2469 of the Code of Civil Procedure, where an order for the debtor's examination has been served, the receiver's title, when vested pursuant to section 2468 of the Code of Civil Procedure extends back so as to include the personal property of the judgment-debtor at the time of the service of the order, except as against *bona fide* purchases or against creditors who have meanwhile received payment from their debtor in good faith and without notice. The words "personal property" in this section include money, chattels, things in action and evidences of debt." Code, § 3343. Section 2469 is a new provision not found in the former

Code, and appears to have been inserted to change the rule declared in *Becker v. Torrance*, 37 N. Y. 631, to the effect that no equitable lien was acquired by a creditor on the property of his debtor by the commencement of supplementary proceedings and that when a receiver is appointed, his title relates to the date of his appointment, and is subject to any lien on the debtor's property acquired by third-persons intermediate the commencement of the proceedings and the appointment of the receiver.

The real question in *McCorkle v. Herrman*, 27 N. Y. St. Rep. 333 ; 117 N. Y. 297, was as to priority of lien between a judgment-creditor of a contractor, who had duly commenced supplementary proceedings on his judgment, terminating in the appointment of a receiver, and laborers and material men, who, subsequent to the commencement of the supplementary proceedings, and within the time allowed by law, filed notices of lien to reach the debt owing the contractor, under a contract with the owner of the building for its construction.

On this point the court say : "The creditor whom the plaintiff represents by the commencement of supplementary proceedings acquired under section 2469 of the Code, an equitable lien on the debt then owing by the defendant, which on the appointment of the receiver, became a legal title in the receiver to the claim of the contractor against the defendant as of the date of the service of the order in the supplementary proceedings. Subsequent to the service of the order, the liens were filed, which of the claimants have the prior right ? We think the plaintiffs as receiver, has the superior claim. He stands as the assignee of the claim of the contractor, against the defendant by a title which antedates the filing of the notices of lien." The lien of the judgment-creditor up to the time of the appointment of a receiver in the proceeding is inchoate, and if the proceedings are not consummated by the appointment of a receiver, the lien becomes extinct upon the discontinuance or dismissal of the proceedings. But it seems that such inchoate lien continues until the proceeding is disposed of as prescribed by section 2454 of the Code. The receiver obtains a legal title to the fund as of the time of the service of the order of examination.

The judgment-creditor stands in as good a position at least as if he had an assignment of the debt from the judgment-debtor as security for his debt. *Estate of Sistue*, 27 Abb. N. C. 34. So, a receiver is bound by a *lis pendens* filed in an action pending at the time of the commencement of the proceedings under which he is appointed. *Spencer v. Berdell*, 45 Hun, 179.

14. Property acquired after service of order for examination.—These proceedings are statutory, and operate on property which the judgment-debtor has at the time the order is obtained (*Potter v. Low*, 16 How. Pr. 549), and do not affect property acquired afterwards (*Merriam v. Hill*, 1 Week. Dig. 260), and the receiver becomes vested from the time of his appointment with the property which the debtor had at the time the proceedings were commenced (*Dubois v. Cassidy*, 75 N. Y. 302), but gets no title to property which the debtor acquires subsequently. *Thorn v. Fellows*, 5 Week. Dig. 473; *Graff v. Bonnett*, 25 How. Pr. 470; *The Columbian Institute v. Cregan*, 3 N. Y. St. Rep. 287; *Masten v. Amerman*, 51 Hun, 244. But in *Stevenson v. Stevenson*, the court say: “A receiver becomes vested with the right to receive the payments to fall due in the future to a wife, the judgment-debtor under the terms of a judgment for divorce awarding semi-yearly alimony for her support and maintenance.”

It is held, however, in a later case that such alimony is absolutely exempt from these proceedings except upon a judgment for necessities. And in *Thorn v. Fellows*, 5 Week. Dig. 573, it was held that where the debtor, at the time of the receiver's appointment, held a note, which he subsequently destroyed, taking other notes of the same person in place thereof, the receiver had no title to the last notes or the proceeds thereof.

15. Real estate—Title of receiver in.—Although section 2468 of the Code of Civil Procedure prescribes that when a receiver is duly appointed, and the order appointing him is duly filed in the office of the clerk of the county where the real estate of the judgment-debtor is situated, it vests in him and no conveyance is necessary; the receiver obtains such title as the statute gives him, and he is entitled to no other. But it seems that the title to the property vests in

him only as security for the payment of the judgment of the judgment-creditor and the costs of the proceedings. The receiver's duties are to appropriate the property of the judgment-debtor to the satisfaction of the judgment under which he is appointed, and restore the surplus, if any, to the judgment-debtor. *Goddard v. Stiles*, 90 N. Y. 206.

It seems that the receiver must cause the property to be sold on execution or by an order of the court. In *First Nat. Bank of Canandigua v. Martin*, 49 Hun, 574, the court say: "If the plaintiff should be permitted to procure the appointment of a receiver, and thus vest the title of the real estate of the judgment-debtor in such receiver, it could be sold and the judgment-debtor deprived of the right of redemption, which is given to him in case of a sale by execution."

The court also say: "There is no authority in the Code authorizing an order directing the judgment-debtor to surrender up possession of real estate to the receiver. As to the right of the judgment-debtor to redeem, it seems that the right in law to redeem lands from sale exists only when given by statute. In equity the general rule is that where all the parties are before the court, and the rule is to be made pursuant to its decree, and by an officer appointed by it for that purpose, the right of redemption will not be allowed except by command of the statute. *Crisfield v. Murdock et al.*, 38 N. Y. St. Rep. 828.

CHAPTER XVIII.

RECEIVERS.—Continued.

I. DUTIES OF RECEIVER.	III. WHEN TITLE TO PROPERTY EXTENDS BACK BY RELATION.
1. In general.	
2. Leave to sue.	IV. BY WHOM RECEIVER CONTROLLED.
3. Receivers as plaintiffs.	V. VACATING ORDER APPOINTING RECEIVER.
II. PRIORITY OF LIEN ON THE PERSONAL PROPERTY OF THE JUDGMENT-DEBTOR.	VI. INJUNCTION ORDER.

I. DUTIES OF RECEIVER.

4. In general.—Rule 28 of the supreme court provides that “every receiver has general power and authority to sue and collect all debts belonging to his judgment-debtor and to compromise such as are doubtful.” He may sue in the name of the debtor where it is necessary or proper to do so. He may by order of the court collect rents. He shall convert all personal effects into money. He may, by leave of court, sell desperate debts and doubtful claims to personal property at public auction, but he cannot sell such debts and claims, even by order of the court, until he has given at least ten days’ public notice of the time and place of sale. A receiver represents the creditors, and possesses the same rights as the creditor under whose judgment he was appointed to prosecuted actions, to set aside all transfers of property made by the debtor to defraud his creditors; and his rights in this respect are not confined to the assigned property, but he can follow the fund or proceeds of the sale thereof into the possession of any person not a *bona fide* owner or holder thereof. The right to collect a debt out of mortgaged property cannot be defeated by the mortgagee simply by selling the property. The same right that existed against the property would exist in favor of the creditor against the proceeds of the sale in the possession of the mortgagee, and an action to reach such a fund would be maintainable by a receiver appointed in supplementary proceedings. *Mandeville v. Avery*, 36 N. Y. St. Rep. 342; 124 N. Y. 376. A receiver cannot take forci-

ble possession of property in the possession of a third person who claims to own it. *Dewey v. Finn*, 18 Week. Dig. 558. But it seems that he can take possession of the property of the judgment-debtor. *Van Rensselaer v. Emery*, 9 How. Pr. 135. He cannot, however, take property exempt by section 2463 of the Code. *Fennin v. Malloz*, 33 N. Y. Supr. 382; *Cooney v. Cooney*, 65 Barb. 524. In petition of *Inglehart*, 1 Sheld. 514, it is held that a receiver cannot sell lands which might be sold under execution. When a receiver obtains a judgment setting aside a deed from husband to wife, he must sell subject to the wife's inchoate dower. *Lowery v. Smith*, 9 Hun, 514. After notice of the receiver's rights a bank cannot pay a deposit owned by the judgment-debtor. *O'Conner v. Mechanics' Bank*, 54 id. 272. A chattel mortgage, executed before but not filed until after the order for examination in supplementary proceedings is served, is void as against the subsequent receiver. *Clark v. Gilbert*, 14 Week. Dig. 241; 10 Daly 316.

2. Leave to sue.—Before a receiver can commence an action, he must obtain leave of the court out of which execution issued. *Hyatt v. Dusenbury*, 5 N. Y. St. Rep. 846; 12 Civ. Pro. Rep. 152. And whenever a receiver appointed under supplementary proceedings shall apply for leave to bring an action, he shall present and file with his application, the written request of the creditor in whose behalf he was appointed, that such action be brought, or else he shall give a bond, with sufficient sureties, and properly acknowledged and approved by the court, to the person against whom the action is to be brought, conditioned for the payment of any costs which may be recovered against such receiver, and leave to bring actions shall not be granted except on such written request, or on the giving of such security. In all other cases where a receiver applies to the court for leave to bring an action, he shall show in such application, that he has sufficient property in his actual possession to secure the person against whom the action is to be brought, for any costs which he may recover against such receiver, otherwise the court may require the receiver to give such bond, conditioned for the payment of costs, and with such security. Rule 79, Sup. Court. So a re-

ceiver may be required to give security for the costs of an appeal by him. *Gifford v. Rising*, 48 Hun, 128.

3. Receivers as plaintiffs.—The production and proof by the plaintiff of an order made by a judge authorized by law to make it, reciting the facts necessary to give such judge jurisdiction to act in the proceedings furnishes conclusive evidence of the regularity of such order, when questioned collaterally, and *prima facie* evidence of the existence of the facts necessary to confer jurisdiction. *Wright v. Nosstrand*, 94 N. Y. 45; *Palmer v. Colville*, 45 N. Y. St. Rep. 706.

An allegation that the plaintiff was duly appointed receiver sufficiently pleads that fact; so a general denial in the answer will compel the plaintiff to prove his allegation. *Matter of O'Conner*, 47 id. 415. The court, in *Mandeville v. Avery*, 36 N. Y. St. Rep. 339; 124 N. Y. 376, settled the question as to the right of a receiver in supplementary proceedings to prosecute actions to set aside transfers of property made by the debtor to defraud his creditors. It is there held that he possesses the same rights as the creditor under whose judgment he was appointed would himself have had, but the title to the property previously transferred by the judgment-debtor does not vest in his receiver, and the latter has no prior or exclusive right to maintain an action to set aside such transfer as fraudulent. A judgment-creditor who has brought the first action to set aside such transfer, has a lien and preference over the receiver. *Metcalf v. Del Valle*, 46 N. Y. St. Rep. 105. And in *Estate of Sistare*, 27 Abb. N. C. 34; 15 N. Y. Supp. 709, the court say: "The interest of a *cestui que trust* in a trust estate who had assigned it before an order had been served on him or the trustees to attend and be examined, cannot be reached." A receiver is vested with the debtor's rights of action and is entitled to be substituted as plaintiff in a pending suit brought by the debtor. In *re Wilde*, 6 Abb. N. C. 307. But in *Re Lansing*, 17 Week. Dig. 288, it is held that it is discretionary with the court whether or not a receiver shall be substituted. A receiver may maintain an action against the judgment-debtor for conversion of property after it became vested in the receiver. *Gardner v. Smith*, 29 Barb. 68. So he may recover from a creditor the

value of property levied upon and sold upon an execution issued subsequent to the service of the order for examination in the proceedings upon which he was appointed. *Fessenden v. Woods*, 3 Bosw. 550.

Such receiver cannot maintain an action to enforce the trust created in favor of the creditors of one paying the consideration for lands, which are conveyed to another.

The judgment-debtor has no interest, legal or equitable, in lands paid for by him, but conveyed to another. The remedy of the creditor is to proceed directly to enforce the trust. *Underwood v. Sutcliffe*, 77 N. Y. 58. So, it seems that a receiver has no power to issue an execution against the judgment-debtor. *Hyatt v. Dusenbury*, 12 Civ. Pro. Rep. 152. And unless a receiver shows that he became vested of the property of the judgment-debtor, he cannot recover the rents and profits in an action to set aside as fraudulent a conveyance of real estate, executed by the judgment-debtor, so as to subject the property to levy and sale on execution. *Wright v. Nostrand*, 98 N. Y. 669. In such an action, the recovery should be limited to an amount sufficient to cover the judgment and interest and costs. *Payne v. Becker*, 87 id. 153; *Bostwick v. Menck*, 40 id. 383. Whether such a receiver obtains such a title to real property as will enable him to maintain an action for partition, does not seem to have been settled. *Dubois v. Cassidy*, 75 N. Y. 298. What was said in *Payne v. Becker*, 87 id. 157, was not necessary to the decision of that case.

II. PRIORITY OF LIEN ON THE PERSONAL PROPERTY OF THE JUDGMENT-DEBTOR.

The lien of a receiver relates back to commencement of the proceedings in which he is appointed, or from the service of the order or warrant for examination as against every one except *bona fide* purchasers for a valuable consideration, and creditors who have received payment of their debts in good faith and without notice. *McCorcle v. Herman*, 117 N. Y. 297; 27 N. Y. St. Rep. 333. Thus, where A. commences proceedings by service of an order for examination, and afterwards proceedings are commenced by B. upon whose application a receiver is appointed, after which A. obtains an order extending the receivership to

his judgment, A. will have the prior lien on the personal property of the judgment-debtor. *Youngs v. Klunder*, 27 N. Y. St. Rep. 32; *Guggenheimer v. Stevens*, 17 Civ. Pro. Rep. 383.

III. WHEN TITLE TO PROPERTY EXTENDS BACK BY RELATION.

Where the receiver's title to personal property has become vested, it extends back by relation, for the benefit of the judgment-creditor in whose behalf the special proceeding was instituted, as follows: Where the order or warrant for examination of the judgment-debtor under either section 2435, 2436 or 2437 of the Code, was served before the appointment of the receiver, the receiver's title extends back, so as to include the personal property of the judgment-debtor, at the time of the service of the order or warrant. And where the only order for examination is under section 2441 of the Code, requiring a person to attend and be examined concerning property belonging, or a debt due, to the judgment-debtor, the receiver's title extends to the personal property belonging to the judgment-debtor which was in the hands, or under the control of the person or corporation thus required to attend at the time of the service of the order, and to a debt due to him from that person or corporation. In every other case, where notice of the application for the appointment of a receiver was given to the judgment-debtor, the receiver's title extends to the personal property of the judgment-debtor at the time when the notice was served, either personally or by complying with the requirements of an order prescribing a substitute for personal service. The title of a purchaser in good faith without notice and for a valuable consideration, is not affected by the above provisions, neither is a party who receives the payment of debt in good faith, and without notice. Code, § 2469.

IV. BY WHOM RECEIVER CONTROLLED.

The control over, and direction of, a receiver is with the court out of which the execution was issued, in the action upon which the proceedings were founded, upon which he was appointed. Code, § 2471. The receiver is an officer of the court, and is bound to obey its directions and subject,

in the general discharge of his duties, to its control. It can direct him as to the time when, and the place where, and the manner in which a sale should be made, and as to the terms thereof. *Syracuse Sav. Bank v. S. C. & N. Y. R. Co.*, 88 N. Y. 110. Subdivision 5 of section 2469 of the Code of Civil Procedure provides that the judge appointing a receiver may appoint another person in his place when the person first appointed ceases to be a resident of the state, and section 715 provides for the removal of a receiver who fails to give the security prescribed by law, by the judge, etc. The court can accept the resignation of a receiver, but whether it can appoint his successor, *quaere*. A receiver can neither sue nor be sued without leave of the court. *James v. James Cement Company*, 8 N. Y. St. Rep. 490; *Foster v. Townshend*, 68 N. Y. 203; but see *Rockwell v. Merrill*, 45 N. Y. 166; Rule 78, Supreme Court.

There should be no removal of a receiver for non-residence alone without the substitution of a qualified receiver in his place. *Terry v. Bange*, 30 N. Y. St. Rep. 285. It is a contempt to bring an action against a receiver without leave of the court (*Taylor v. Baldwin*, 14 Abb. 166), and the party suing may be restrained. *Camp v. Barney*, 4 Hun, 373. A receiver may institute summary proceedings to recover possession of leased premises for non-payment of rent. *Matter of Renwick*, 1 Law Bull. 19.

V. VACATING ORDER APPOINTING RECEIVER.

An order appointing a receiver by a judge authorized to make it, is to be presumed regular until annulled in a direct proceeding. *Wright v. Nostrand*, 94 N. Y. 31. There is no appeal from the order, and it can be reviewed only under section 2433 of the Code. *Moschell v. Boor*, 50 N. Y. St. Rep. 238. Thus, the order appointing a receiver may be vacated or modified by the judge who made it, as if it was made in an action, or it, or the order of the judge, vacating or modifying it, may be vacated or modified upon motion, by the court out of which the execution was issued. The Code does not confer upon the judge at chambers, on an *ex parte* application, the power to make an order affecting the substantial rights of the prosecuting creditor,

without giving notice of the application to him. *Dorsey v. Cummings*, 48 Hun, 76.

The judgment-debtor is the only person who can avail himself of any irregularity in the proceedings. *Underwood v. Sutcliffe*, 10 Hun, 453.

VI. INJUNCTION ORDER.

An order restraining the transfer of property "until further order in the premises" is superseded by an order appointing a receiver, and a subsequent transfer is not a contempt. *People v. Randall*, 73 N. Y. 416; *Morris v. First Nat. Bank*, 68 id. 362. The judgment-creditor should, therefore, procure an order with a restraining clause inserted as allowed by section 2450 of the Code.

CHAPTER XIX.

CONTEMPT.

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| <p>I. PROCEEDINGS FOR.</p> <ol style="list-style-type: none"> 1. Nature of. 2. What court or judge has jurisdiction. 3. Who may apply for order. <p>II. ACTS THAT ARE PUNISHABLE.</p> <ol style="list-style-type: none"> 4. In general. 5. Failure to appear. 6. Witnesses. 7. Refusal to comply with order. 8. Interference with property. <p>III. EXCUSES, SUFFICIENCY OF.</p> <p>IV. WHERE PUNISHMENT MAY BE SUMMARY.</p> <ol style="list-style-type: none"> 9. In general. 10. When warrant to commit may issue without notice. <p>V. ORDER TO SHOW CAUSE OR WARRANT TO ATTACH OFFENDER.</p> <p>VI. WHEN CONTEMPT WAS COMMITTED BEFORE A REFEREE.</p> <p>VII. EFFECT OF ORDER TO SHOW CAUSE AND OF WARRANT.</p> | <p>VIII. WARRANT, HOW EXECUTED.</p> <p>IX. UNDERTAKING TO PROCURE DISCHARGE.</p> <p>X. HABEAS CORPUS MAY ISSUE WHEN.</p> <p>IX. INTERROGATORIES AND PROOF.</p> <ol style="list-style-type: none"> 11. In general. 12. Practice as to proofs. <p>XII. ORDER ADJUDGING PARTY GUILTY AND COMMITMENT.</p> <ol style="list-style-type: none"> 13. In general. 14. Form of order. <p>XIII. PRACTICE IN REVIEW OF ORDERS.</p> <p>XIV. PUNISHMENT IN CONTEMPT PROCEEDINGS.</p> <ol style="list-style-type: none"> 15. On a habeas corpus. 16. Upon order to show cause. 17. Amount of fine. 18. Length of imprisonment. 19. Jail liberties. 20. Release of offender. 21. Undertaking as indemnity. |
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I. PROCEEDINGS FOR.

1. Nature of.—Proceedings for contempt are themselves special proceedings, independent of the action or special proceeding in which they may be taken ; and an order made therein cannot be regarded as an order made in the course of the original proceedings. *People ex rel. Grant v. Warner*, 20 N. Y. St. Rep. 573 ; *Moschell v. Boor*, 50 id. 238. Proceedings for the contempts mentioned in sections 14 and 2457 of the Code of Civil Procedure, are regulated by sections 2266–2292, inclusive. Section 2457 of the Code of Civil Procedure provides that a person who refuses, or, without sufficient excuse, neglects to obey an order of a judge or referee, made in supplementary proceedings, and duly served upon him, or an oral direction, given directly

to him by a judge or referee, in the course of the special proceeding, or to attend before a judge or referee, according to the command of a subpoena, duly served upon him; may be punished by the judge, or by the court out of which the execution was issued as for a contempt.

2. **What court or judge has jurisdiction.**—Section 2457 of the Code of Civil Procedure provides that contempts in these proceedings may be punished by the judge, or by the court out of which the execution was issued. The judge mentioned in section 2457 is the judge mentioned in sections 2434 and 2462 of the Code of Civil Procedure, that is to say, the judge who granted the order or the one to whom it is made returnable. *Wicker v. Dresser*, 13 How. Pr. 331; *Dresser v. Van Pelt*, 15 id. 19; *Kelly v. McCormick*, 2 E. D. Smith, 503. In *Blanchard v. Reilly*, 11 Civ. Pro. Rep. 278–281, it was held that the provision that disobedience of an order may be punished by the judge or by the court out of which the execution was issued, means that the judge before whom the proceedings were instituted, or the court at special term, out of which the execution was issued, may do so.

In *Gamman v. Berry*, 34 Hun, 138, it was held that an order requiring a person to show cause why he should not be punished for contempt, made by a county judge whose term expires before the return day, may be heard before his successor. A special surrogate or special county judge who issues the original order has power to punish a contempt thereof. *Aldrich v. Davis*, 46 N. Y. St. Rep. 587.

3. **Who may apply for order.**—Section 2266 of the Code provides that any person, whose right or remedy to a special proceeding, pending before the judge or referee, is defeated, impaired, impeded or prejudiced by a party refusing to obey an order, may prosecute for the misconduct or other injury complained of.

II. ACTS THAT ARE PUNISHABLE.

Proceedings to punish for contempt are of two kinds, each having a distinct object in view: the one, to protect the rights of private parties and the other to maintain the dignity of the court, and to punish persons guilty of willful disobedience to its mandates. In the former case, the pur-

pose being to preserve private rights, it is immaterial whether the contempt was designedly or negligently committed; the power and duty of the court, to redress the wrongs of the injured party are the same. *People v. Aitken*, 19 Hun, 327. But it is indispensable for the punishment of the party that it should be made to appear, and be determined by the judge or court, that the misconduct complained of was calculated to, and actually did defeat, impair, impede or prejudice the rights or remedies of a party to an action or special proceeding brought in court or before a judge or referee. *Matter of Swenorton v. Shupe*, 40 id. 41. It must be adjudged by the order that the accused has been guilty of the contempt, and that such misconduct was calculated to and did impair, defeat, impede and prejudice the rights and remedies of the prosecutor or parties in the proceedings, and the order must impose a fine sufficient to indemnify them and to satisfy the costs and expenses, and "where anything further remains to be done by the party guilty of the contempt, the order should also specify particularly what he is to do, and the manner in which it is to be done, to entitle him to his discharge upon the payment of the fine imposed. Code Civ. Pro., §§ 2281 and 379.

A party bound to obey an injunction may be guilty of a violation thereof, as well as for aiding, abetting and countenancing others in violating it, as by doing it directly.

So, knowledge of the injunction or information of its contents, is sufficient to impose upon the enjoined party the duty of obeying it, so far as the pecuniary rights of the creditors are concerned, although the injunction order was not shown to him when a copy of it was served. *The Mayor v. N. Y. & S. I. Ferry Co.*, 64 N. Y. 622. One who has been adjudged liable for costs and directed to pay them, upon a failure to pay the same may be adjudged in contempt and fined the amount of the costs which he has been directed to pay without any further proof to show damage other than he has refused to pay them. *Tucker v. Gilman*, 37 N. Y. St. Rep. 958.

5. Failure to appear.—Where the judge has jurisdiction of the subject-matter, the order for examination is not void, and the party served with the order must obey it or take

proper steps to set it aside. *Matter of Flenning*, 40 N. Y. St. Rep. 705; 16 N. Y. Supp. 1. Failure to appear is a contempt although the order of the judge does not name the time and place of appearance, but directs the debtor to appear at such times and places as may be appointed by the referee. *Redmond v. Goldsmith*, 2 Law Bull. 19. The fact that the order is irregular is no excuse for non-appearance. *Shults v. Andrews*, 54 How. Pr. 378. And the fact whether the summons in the original action had been served cannot be considered by the court upon a motion for an order adjudging the defendant in contempt for not obeying an order for his examination. *Perkins v. Kendall*, 3 Civ. Pro. Rep. 240. So proof that the execution had not been returned is no answer to a motion for an order to punish for contempt for non-appearance. *Holbrook v. Orgler*, 40 N. Y. Supr. 33.

6. Witnesses.—It is contempt for a judgment-debtor or other witness to refuse to answer legal and proper questions (*People v. Davidson*, 35 Hun, 471), and to fail to attend after tender of his legal fees. *Andrews v. Andrews*, 2 John. Cas. 109. It is a contempt for a witness to refuse to be sworn, or to leave the room contrary to the oral direction given directly to her by the referee. *Howe v. Welch*, 11 Civ. Pro. Rep. 444. Or to fail to produce books in her possession when ordered to produce them. *Shelp v. Morrison*, 13 Hun, 110; *Central Nat'l Bank v. Arthur*, 2 Sweeny, 194. A witness cannot be punished for contempt for refusing to answer a question immaterial or irrelevant to the issue. *Matter of Odell*, 6 Dem. 344. So where the court or referee has no jurisdiction to proceed in the examination (*People v. Warner*, 20 N. Y. St. Rep. 573), or where the referee has an office with the attorney for the judgment-creditor. *Gilbert v. Frothingham*, 13 Civ. Pro. Rep. 288. A witness or party is entitled to a reasonable time to go to the place of examination by the usual means of travel. *People v. Potter*, 6 N. Y. St. Rep. 753, and a witness should not be required to sign his deposition when his so doing might subject him to liability not otherwise existing. *Marx v. Spaulding*, id. 530.

7. Refusal to comply with order.—To authorize the court to punish a party for contempt in refusing to pay over

money in pursuance of its order; it must appear that the specific sum of money was in his possession, or under his control at the time of the service of the order. *Tinker v. Crooks*, 22 Hun, 579. It is not sufficient that the order or judgment requiring the payment of money or the delivery of property, be served upon the party, and he be made fully acquainted with its effect, but in addition thereto, a compliance with the order or judgment must be explicitly demanded by a party who has a right to make such demand. *McComb v. Weaver*, 11 Hun, 271; *Gray v. Cook*, 24 How. Pr. 432; *Tinkey v. Langdon*, 60 id. 180. But service of the copy of order of court upon sheriff to pay money into court is sufficient without a demand. *Whitman v. Haines*, 21 N. Y. St. Rep. 41. So if the judge finds the defendant able to pay the judgment and orders him to pay the same within a time specified and also the costs stated, the defendant, if he fails, may be proceeded against as for contempt. *Brush v. Lee*, 6 Abb. N. S. 50. When a decree does not specify the precise amount, a defendant cannot be punished for contempt, for not paying over the money therein ordered to be paid over. *Goodenough v. Davids*, 3 Law Bull. 57. And contempt proceedings will only be entertained to enforce a judgment or decree, when there can be no opportunity for ambiguity or doubt as to the precise thing to be done by the party proceeded against. *Ross v. Butler*, 57 Hun, 110. And to punish for a violation of an injunction, the act complained of must be clearly embraced within the inhibited act. *Porous Plaster Co. v. Seabury*, 16 N. Y. St. Rep. 35. Nor will it apply to an act equally injurious with the one inhibited. *Standard Stock Farm v. Nat. Trot. Assn.*, 31 id. 213.

8. Interference with property.—Parties may be punished for violating an injunction order who may have merely heard that such order has been granted. *Mayor v. N. Y. & S. I. Ferry Co.*, 40 N. Y. Supr. 300; 64 N. Y. 623; *Dinsmoor v. The Comm. Trav. Assn.*, 38 N. Y. St. Rep. 624; *Livingston v. Swift*, 23 How. Pr. 1. But in order to support a conviction for contempt, the legal title to the property, the transfer of which forms the contempt, must be proven to be in the accused. *Dean v. Hyatt*, 5 Week. Dig. 67. And it must be shown affirmatively that it was ac-

quired before the date of the order. *Potter v. Law*, 16 How. Pr. 549. Thus, a judgment-debtor cannot be held guilty of contempt for disposing of property acquired after the service of the injunction order in supplementary proceedings; the injunction relates only to property or debts in existence at the time of its service.

It has been invariably held that the injunction relates only to property of the judgment-debtor existing at the time of the service of the order.

The difference in language of the enactments of the former Code, section 298, and the Code of Civil Procedure, section 2451, has not, so far as our attention has been called to any case, been held to authorize an injunction against the disposition of property not in existence when the order is made.

On the contrary, the city court, in a case arising under the present Code, has decided that the injunction does not extend to property acquired, or money earned, after the date of the order in supplementary proceedings. *Sanford v. Goodwin*, 20 Civ. Pro. Rep. 276, note. The case of *Newell v. Cutler*, 19 Hun, 74, was plainly that of a judgment-debtor using wages earned before the order was served, but collected afterwards, a case in harmony with the current of decisions which held such earnings subject to the order.

The former Code provided: "The judge may also, by order, forbid a transfer or other disposition of the property of the judgment-debtor, not exempt from execution, and any interference therewith." The present Code provides: "The judge * * * may make an injunction order, restraining any person or corporation, whether a party or not a party to the special proceeding, from taking or suffering any transfer or other disposition of, or interference with, the property of the judgment-debtor, or the property or debt, concerning which any person is required to attend and be examined until further direction in the premises." It is a contempt for a judgment-debtor, upon whom an injunction order has been served, to confess judgment for a fictitious debt in another state. *Fenner v. Sanborn*, 37 Barb. 610. So is the conveying of property. *Wolf v. Jacobs*, 45 N. Y. Supr. 583; *Rainford v. Temple*, 51 N. Y.

St. Rep. 144. Thus a judgment-debtor who has commenced an action as administrator for damages for the death of his son, will be in contempt if he assigns his interest, after the service of an injunction order upon him. *Wynkoop v. Myers*, 26 N. Y. St. Rep. 81. But such person may change securities, or carry out a contract previously made. *Duffus v. Cole*, 15 N. Y. Supp. 370; *Parker v. Wakeman*, 10 Paige, 485.

III. EXCUSES—SUFFICIENCY OF.

That the order disobeyed was erroneously granted, is no excuse for disobedience of the same. The party who disobeys the order is guilty, unless it is void on its face from an utter want of jurisdiction. *Erie Railway Co. v. Ramsey*, 45 N. Y. 637; *People v. Bergen*, 53 id. 404. The fact that an injunction has been improvidently granted is no excuse for its violation, and one who has willfully disobeyed an injunction cannot attack it until he has purged himself of his contempt. *Koehler v. Farmers & Drovers' Bank*, 25 N. Y. St. Rep. 222; 17 Civ. Pro. Rep. 307; *People v. Dwyer*, 90 N. Y. 402; *Park v. Park*, 80 id. 156. A knowledge of the issuing and of the provisions of an injunction is equivalent to a personal service of the injunction order. *Gage v. Denbow*, 49 Hun, 43. That a party was ill and unable to leave the house on the return day of the order, is a sufficient excuse for non-attendance. *Walters v. Kenyon*, 4 N. Y. St. Rep. 398.

IV. WHEN PUNISHMENT MAY BE SUMMARY.

Where the offense is committed in the immediate view and presence of the judge or referee, it may be punished summarily.

For that purpose, an order must be made by the court, judge or referee, stating the facts which constitute the offense, and bring the case within the provisions of the Code, and plainly and specifically prescribing the punishment to be inflicted therefor. Code, § 2267. Where the offense is committed in the presence of the court, the facts embodied in the order of the judge must be taken as true, but where committed out of court, the right of review is a matter of right. *Matter of Eldridge*, 82 N. Y. 161. An order made by the court is a sufficient commitment where

the contempt has been committed in the presence of the judge or court. *Matter of Percy*, 2 Daly, 530.

10. When warrant to commit may issue without notice.

—When the offense consists of a neglect or refusal to obey an order, requiring the payment of costs or of a specified sum of money, and the court is satisfied, by proof, by affidavit that a personal demand thereof has been made, and the payment thereof has been neglected or refused, it may issue, without notice, a warrant to commit the offender to prison until the costs or other sum of money, and the costs and expenses of the proceeding are paid, or until he is discharged according to law. Code, § 2268. No proof that the party has money wherewith to pay is necessary. *People v. Cowles*, 4 Keyes, 38; *In re Kelly*, 62 N. Y. 198. But unless the commitment states the amount to be paid it is fatally defective. *People v. Grant*, 20 N. Y. St. Rep. 48. The affidavit must show that a personal demand was made by a person authorized to make it. *Fisher v. Raab*, 81 N. Y. 235. It must further show that a certified copy of the order has been served upon the judgment-debtor. *Ryckman v. Ryckman*, 32 Hun, 193. But a personal service of a copy of an order is not a “personal demand of payment.” *Union Trust Co. v. Gage*, 6 Dem. 358.

It must further appear that the order has been duly filed in the county clerk’s office. *Bareither v. Broschi*, 19 Civ. Pro. Rep. 445. Section 2268 of the Code is qualified by subdivision 3 of section 14, so that a party can only be punished, by way of fine or imprisonment, for non-payment of a sum of money where an execution cannot be issued for the collection of that sum. *Matter of Hess*, 16 N. Y. St. Rep. 255; 48 Hun, 586.

V. ORDER TO SHOW CAUSE, OR WARRANT TO ATTACH OFFENDER.

These proceedings cannot be commenced by notice of motion. *Wilson v. Craig*, 12 Week. Dig. 73. But the court or judge, authorized to punish for the offense, may, in its or his discretion, where the case is one of those specified in either sections 2267 or 2268 of the Code, and, in every other case must, upon being satisfied, by affidavit, of the commission of the offense, either (1) make an order requiring

the accused to show cause before it, or him, at a time and place therein stated, why the accused should not be punished for the alleged offense; or (2) issue a warrant of attachment, directed to the sheriff of a particular county, or generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offense. Code, § 2269.

Parties must elect their course of procedure, and be governed by such election in all subsequent stages of the proceedings. *People v. Grant*, 20 N. Y. St. Rep. 48; 50 Hun, 234.

In either mode of proceeding the party complaining of the alleged misconduct must lay a foundation for the proceeding, by affidavit, or other evidence, that the accused is in contempt. *Albany City Bank v. Schermerhorn*, 9 Paige, 372.

The certificate of a referee in supplementary proceedings is not legal evidence of a default by the judgment-debtor to appear. An affidavit proving the facts charged is necessary. *Rineland v. Dunham*, 2 Civ. Pro. Rep. 32. The affidavit must also show the service of the order and the failure of the party to obey it. *Ward v. Aronson*, 10 Bosw. 589.

The order to show cause must give the party a reasonable time in which to appear. *Powers v. Village of Athens*, 19 Hun, 165. And before an attachment can issue against a party, what he can properly be required to do must be distinctly settled and ascertained. *Sutton v. Davis*, 6 Hun, 237. And an order should contain an adjudication that there is probable cause for its issue. *M'Credie v. Senior*, 4 Paige, 378.

As to how papers should be entitled in attachment and other proceedings, see *Pitt v. Davidson*, 37 N. Y. 235; *Matter of Bronson*, 12 John. 460.

Where the order to show cause or warrant is returnable before the court, it may be made or issued by any judge authorized to grant an order without notice, in an action pending in the court, and it must be made returnable at a term of the court at which a contested motion may be heard. Code, § 2271.

VI. WHEN CONTEMPT WAS COMMITTED BEFORE A REFEREE.

It seems that section 2272 of the Code only applies to a referee upon the trial of an issue referred to him, and that an order to punish a witness or party for a contempt before a referee in supplementary proceedings must be made by the judge, or by the court out of which the execution was issued. Code, § 2457.

VII. EFFECT OF ORDER TO SHOW CAUSE AND OF WARRANT.

An order to show cause may be made, either before or after the final order in the special proceedings. It is equivalent to a notice of motion, and the subsequent proceedings thereupon are taken in the proceeding, as upon a motion made therein. A warrant of attachment is a mandate, whereby an original special proceeding is instituted, against the accused, in behalf of the people, upon the relation of the complainant. Code, § 2273. *Fisher v. Raab*, 81 N. Y. 235.

VIII. WARRANT, HOW EXECUTED.

A copy of the warrant, and of the affidavits upon which it is issued, must be served upon the accused, when he is arrested by virtue thereof. Code, § 2274. This section refers to the affidavits on which a warrant of attachment may be issued to try the delinquent before the court to answer for his alleged contempt. By section 2268 of the Code of Civil Procedure the court can dispense with this proceeding. *People v. Grant*, 11 N. Y. St. Rep. 558; 46 Hun, 677. The service of the papers may be waived. *Hart v. Johnson*, 43 id. 505.

When a warrant or attachment is issued, the court or judge may, in its or his discretion, by an indorsement thereupon, fix a sum in which the accused may give an undertaking for his appearance to answer. Code, § 2277.

If an indorsement is not made upon the warrant, or if such indorsement is made and an undertaking is not given, the sheriff, after making the arrest, must keep the accused in his custody until the further direction of the court, or judge. The sheriff need not, in any case, confine the accused in prison, or otherwise restrain him of his liberty. Code, § 2276.

IX. UNDERTAKING TO PROCURE DISCHARGE.

Where an indorsement is made on the warrant fixing a sum in which the accused may give an undertaking, he must be discharged from arrest, upon his executing and delivering to the sheriff, at any time before the return day of the warrant, an undertaking to the people, in the sum specified in the indorsement, with two sufficient sureties, to the effect that he will appear, at the time when and the place where the warrant is returnable, and then and there abide the direction of the court or judge. Code, § 2277. The sheriff or other officer must file the undertaking, if any, taken by him, with the return of the warrant or writ of habeas corpus. Id. 2279.

X. HABEAS CORPUS MAY ISSUE, WHEN.

If the accused is in the custody of a sheriff, or other officer, by virtue of an execution against his person, or by virtue of a mandate for any other contempt or misconduct, or a commitment on a criminal charge, a warrant of attachment cannot be issued. In that case, the court, upon proof of the facts, must issue a writ of habeas corpus, directed to the officer requiring him to bring the accused before it, to answer for the offense charged. The officer to whom the writ is directed, or upon whom it is served, must, except in a case where the production of the accused upon a warrant of attachment would be dispensed with, bring him before the court, and detain him at the place where the court is sitting, until the farther order of the court. Code, § 2278. This section does not provide that the proceeding by an order to show cause cannot be taken, and under said provision does not render the court powerless to punish for contempt, save by proceedings instituted by habeas corpus. *People v. Grant*, 20 N. Y. St. Rep. 48; 50 Hun, 243; 13 Civ Pro. Rep. 305.

XI. INTERROGATORIES AND PROOF.

II. In general.—When the accused is produced, by virtue of a warrant or writ of habeas corpus, or appears upon the return of a warrant, the court, judge or referee must; unless he admits the offense charged, cause interrogatories to

be filed, specifying the facts and circumstances of the offense charged against him.

The accused must make written answers thereto, under oath, within such reasonable time as the court, judge or referee allows therefor, and either party may produce affidavits or other proofs contradicting or corroborating any answer. Upon the original affidavits, the answer and subsequent proofs, the court, judge or referee must determine whether the accused has committed the offense charged. Code, § 2280 ; *People v. Cartwright*, 11 Hun, 362 ; *Lathrop v. Clapp*, 40 N. Y. 328 ; *Pitt v. Davison*, 37 id. 235.

The interrogatories should be confined to the facts of the service of the order or process, and to the acts of neglect or commission constituting the violation thereof. *Brown v. Anderson*, 1 Barb. 227.

It is only necessary to file interrogatories where the proceedings are commenced by warrant or habeas corpus. *Mayor v. N. Y. & S. I. Ferry Co.*, 64 N. Y. 622. Where the proceedings are commenced by an order to show cause, an order of reference may be made without filing interrogatories. *People v. Alexander*, 3 Hun, 211 ; *Roosevelt v. Edson*, 7 Civ. Pro. Rep. 5.

12. Practice as to proof.—On a motion to commit for contempt for disobedience, the only issues are as to regularity of the proceedings under the order and the excuse for disobedience. *Hilton v. Patterson*, 18 Abb. 245. And the plea that the disobedience of the order of the court was harmless and the act done ineffectual and a nullity, is not an answer to a proceeding to punish the party who disobeyed the order for contempt. *People v. Dwyer*, 90 N. Y. 402. No inquiry into the merits of the order will be allowed. *Koehler v. Farmers and Drivers' Bank*, 14 Civ. Pro. Rep. 71. The usual practice is to issue aailable attachment, file and serve interrogatories, and order that the accused be required to make written answers, and that it be referred to a referee to examine them on oath and to take such further proofs as either party may produce, and to ascertain what injury, if any, plaintiff sustained in consequence thereof, with his opinion thereon, and that after the coming in of the referee's report, either party may move at special term for the final order in the matter. *Atlantic & Pac. Tel. Co.*

v. B. & O. R. R. Co., 46 N. Y. Supr. 377. In order to constitute a contempt, the referee or court must find and adjudge that it was such as to defeat, impair, impede or prejudice a right or remedy of the judgment-creditor. *Fisher v. Raab*, 81 N. Y. 235 ; *Sandford v. Sandford*, 40 Hun, 540 ; 2 N. Y. St. Rep. 133. But the refusal of a party examined under section 2441 of the Code of Civil Procedure, to answer pertinent questions as to whether he had property of the judgment-debtor, does tend to defeat, impair, impede and prejudice the rights and remedies of the judgment-creditor and authorizes the court to adjudge that they were in fact so defeated and impaired. *Hart v. Johnson*, 7 N. Y. St. Rep. 133 ; 43 Hun, 505. It seems that the judge has no right to take oral testimony on a motion to punish for contempt when there is a proper objection thereto, made in time. *King v. Barnes*, 51 id. 550 ; 22 N. Y. St. Rep. 54. The proper practice is to appoint a referee under section 2443 of the Code, to take the testimony and report the evidence or the facts. But before the judgment-debtor or third-party is adjudged guilty of contempt he should be furnished with a copy of interrogatories and sufficient time given to prepare his answer. *DeWitt v. Dennis*, 30 How. Pr. 131. If the judgment-debtor or third-person fails to appear, the judge cannot adjudge him guilty of contempt until the moving party makes a case for granting the order on the merits. *Tinkey v. Langdon*, 60 id. 180.

He must show personal service of the order, and the non-compliance with, of which is sought to be punished. *Matter of Smith*, 15 N. Y. St. Rep. 733 ; *Sandford v. Sandford*, 2 id. 133.

Thus, where a judgment-debtor upon the return day applies to have an order dismissed which directed him to appear and be examined, and the motion is denied, and an order is made directing him to appear at a subsequent day, the second order must be served personally in order to bring him into contempt for disobeying it (*McCauley v. Palmer*, id. 600 ; 40 Hun, 38 ; 9 Civ. Pro. Rep. 390), and it seems that if the second order is made by the court, instead of a judge, the order is a nullity.

The certificate of a referee to the default of the judg-

ment-debtor or third-person in appearing is not legal evidence of it.

An affidavit proving the fact is necessary. *Rineland v. Dunham*, 2 Civ. Pro. Rep. 32. And where the alleged misconduct is denied, the affidavits and papers upon which the proceedings were instituted are not evidence upon the issues, but simply perform the office of pleadings or statements of the charges relied upon. Affidavits are sufficient to originate the proceedings, but upon the trial of the issues the common law rules of evidence must be observed. *Matter of Eldridge*, 82 N. Y. 161; *Fall Brook Coal Co. v. Heckscher*, 6 N. Y. St. Rep. 676.

The order should clearly embrace the act complained of. *Porous Plaster Co. v. Seabury*, 16 N. Y. St. Rep. 35.

XII. ORDER ADJUDGING PARTY GUILTY, AND COMMITMENT.

13. In general.—If it is determined that the accused has committed the offense charged and that it was calculated to, or actually did defeat, impair, impede, or prejudice the rights or remedies of the parties to a special proceeding, brought before the judge or referee, the court or judge must make a final order accordingly, and direct that he be punished by fine or imprisonment, or both, as the nature of the case requires. A warrant of commitment must issue accordingly. Code, § 2281.

14. Form of order.—Unless the order contains the adjudication and determination prescribed by sections 2266 and 2281 of the Code, it is voidable if not void. *Boon v. McGucken*, 50 N. Y. St. Rep. 901.

There must be an express adjudication that the misconduct complained of did damage or prejudice the right or remedy of the party affected by it. *Dinsmore v. Commercial Trav. Assn.*, 38 id. 624. But in a commitment for contempt by a court of general jurisdiction, all the preliminaries to warrant the imprisonment need not be set out. Where the commitment recites the jurisdictional facts required by the Code, its validity is not affected by the failure to recite the service of the order, requiring the performance of the acts, for failure to do which the party was adjudged in contempt, and it cannot be held invalid on that account in habeas corpus proceedings. *Matter of Muller*, 51 id. 27.

It need not recite that evidence necessary to give jurisdiction has been presented. *People v. Court of O. & T.*, 27 How. Pr. 14. But it must designate the particular misconduct of which defendant is convicted. *DeWitt v. Dennis*, 30 How. Pr. 131. Thus, where a prisoner was held on a commitment containing several charges, one being that he was guilty of contemptuous behavior, it was held, that as no act or behavior was specified it was only a conclusion, and was bad. *Matter of Clark*, 2 Law Bull. 22.

The order should recite the substance of the alleged misconduct, the adjudication of the court, that the misconduct was calculated to and did impair, defeat and prejudice the rights or remedies of the prosecutor, and direct the payment of a fine, stating its several items, if any. The costs should be taxed and inserted in the order as part of the fine imposed. Where anything remains to be done to purge the contempt, the order should specify what is to be done, and the manner. But see *Estate of McMaster*, 14 Civ. Pro. Rep. 195; *Matter of Bernhard*, 16 N. Y. St. Rep. 240. But in the *Matter of Sims*, 32 N. Y. St. Rep. 1004, it was held that an allegation of the non-payment of alimony is sufficient.

The contrary was held in *Kuhn v. Kuhn*, 4 N. Y. Supp. 952.

Where the warrant of commitment of a witness is for refusing to answer a question, it must show that the question was pertinent or legal and proper, in a proceeding pending, and the question which the witness has refused to answer should be set out *in haec verba* in the commitment. *People v. Davidson*, 35 Hun, 471; *Matter of Quin*, 2 Law Bull. 38; *Duffus v. Brown*, 12 N. Y. St. Rep. 454; 46 Hun, 320. This rule seems to be limited to justice's courts, and in certain proceedings before boards, arbitrators, committees and referees. In *re Jones*, 6 Civ. Pro. Rep. 250; *People v. Fancher*, 2 Hun, 226, it is held that while the order of commitment must be strictly construed and is not to be extended by intendments or implications, the warrant must follow the terms of the order. *People v. Bergen*, 6 Hun, 267; 53 N. Y. 404. And such order is radically defective if it fails to adjudge that the acts of the accused, defeated, impaired, impeded or prejudiced the party apply-

ing therefor, in his rights. *Mendel v. Mendel*, 4 N. Y. St. Rep. 556; *Cleary v. Christie*, id. 117; 41 Hun, 466. And where the order for a precept fails to adjudicate in terms that the accused had committed the offense charged, and that it was calculated, and did, defeat, impair, etc., the rights or remedies of plaintiff, cannot be sustained. *Mahon v. Mahon*, 5 Civ. Pro. Rep. 58. Yet where the commitment, the order, and the affidavit upon which it was founded, state in detail the proceedings which it is claimed the disobedience affected, this is a full compliance with the requirements of the rule in respect to the contents of the commitment. *Fisher v. Langbein*, 103 N. Y. 84. The imposition of a fine larger than \$250, and costs as a punishment for contempt under section 14, in the absence of proof of the extent of the loss sustained, is without authority. *Moffat v. Herman*, 116 N. Y. 131; 26 N. Y. St. Rep. 328; 17 Civ. Pro. Rep. 357.

XIII. PRACTICE IN REVIEW OF ORDER.

As a general rule the propriety of a commitment for contempt is not examinable in any other court than the one by which it was awarded. But this is of course subject to the qualification that the conduct charged as constituting the contempt, must be such that some degree of delinquency or misbehavior can be predicated of it; for if the act be plainly indifferent or meritorious, or if it be only the assertion of the undoubted right of the party, it will not become a criminal contempt by being adjudged to be so.

The question whether the alleged offender really committed the act charged, is conclusively determined by the order. *Matter of Hackley*, 24 N. Y. 74; 24 How. Pr. 369. And where a final order has been made, convicting a person of contempt, and pronouncing judgment of fine and imprisonment, a *certiorari* may be issued to review them. *People v. Donohue*, 22 Hun, 470; 59 How. Pr. 417. The proceedings may be entitled as in a special proceeding. *People v. Petten*, 21 N. Y. St. Rep. 894. The question as to whether orders in contempt proceedings were properly served, whether an injunction was lawfully granted, and as to the amount of the fine, must be reviewed by appeal from the order adjudging the party in contempt. *People v. Grant*,

20 id. 48; 13 Civ. Pro. Rep 305; *Watrous v. Kearney*, 11 Hun, 584. But in case of irregularity in the proceedings the remedy is by motion. *Davidson's case*, 13 Abb. 129. And it seems that proceedings for contempt in supplementary proceedings do not come within the terms of section 2433 of the Code of Civil Procedure. *Moschell v. Boor*, 50 N. Y. St. Rep. 238. The court has power to refuse to hear a party while he is in contempt for disobeying its order; and it may strike out his answer, etc. *Walker v. Walker*, 82 N. Y. 260; 20 Hun, 400. This may be done when a party refuses to produce a paper or document which he has in his possession. *Shelp v. Morrison*, 13 id. 110. Although a party in contempt, and until he is purged of it, will not be permitted to ask for the favor of the court, nor take any aggressive proceedings against his adversary, he may take measures to protect himself, and make any motion designed to show that the order adjudging him in contempt is erroneous. *Spratt v. Huntington*, 48 How. Pr. 97; *Matter of Stuart*, 24 Hun, 246; *Brinkley v. Brinkley*, 47 N. Y. 40.

XIV. PUNISHMENTS IN CONTEMPT PROCEEDINGS.

15. On habeas corpus.—Where the accused is brought up by virtue of a writ of *habeas corpus*, he must, after the final order is made, be remanded to the custody of the sheriff, or other officer, to whom the writ is directed. If the final order directs that he be punished by imprisonment or committed until the payment of a sum of money, he must be so imprisoned or committed, upon his discharge from custody, under the mandate, by virtue of which he is held by the sheriff or other officer. Code, § 2282.

16. Upon order to show cause.—Upon the return of an order to show cause, the questions which arise must be determined, as upon any other motion, and, if the determination is to the effect specified in section 2281 of the Code of Civil Procedure, the order must be to the same effect as the final order therein prescribed. Upon a certified copy of the order so made, the offender may be committed without further process. Code, § 2283.

17. Amount of fine.—If an actual loss or injury has been produced to a party to special proceedings, by reason of the misconduct proved against the offender, and the case is not

one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine sufficient to indemnify the aggrieved party must be imposed upon the offender and collected and paid over to the aggrieved party under the direction of the court. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid in like manner. Code, § 2284.

The court or judge may include in the amount of fine, counsel fees. *People v. R. & St. Louis R. Co.*, 76 N. Y. 294; 14 Hun, 371; *Van Valkenburg v. Doolittle*, 4 Abb. N. C. 72.

But such counsel fees are not allowed in supplementary proceedings. *Id.* Costs on attachment are allowed as in the original action, not as in special proceedings. *Seeley v. Black*, 35 How. Pr. 359. A fine equal in amount to moneys withdrawn from a bank account in violation of the order may be imposed. *People v. Kingsland*, 3 Keyes, 325. And the court may impose a fine for disobedience of an order restraining a judgment-debtor from disposing of his property, equal to the amount of the judgment, or to the value of the property so disposed of. *Lippert v. Olejniezak*, 19 N. Y. St. Rep. 463; *Feeley v. Glennen*, 2 Law Bull. 19. For failure to appear, the fine should be limited to such a sum as will reimburse the creditor for his costs and expenses. *Reynolds v. Gilchrest*, 9 Hun, 203. If actual loss or injury is produced, the amount thereof must be based upon legal proof of the damage actually sustained. *Ludeke v. Coursen*, 52 N. Y. St. Rep. 516. But a judge or court may impose a fine for the disobedience of a subpoena, though no actual loss or injury to the party subpoenaing the witness has been occasioned. *People v. Brown*, 12 id. 454; 46 Hun, 320. So in any case when the contempt is a criminal one. *Stubbs v. Ripley*, 39 id. 626. The including of improper items of costs in the fine does not render the commitment void; it must be reviewed on motion or on appeal, as the case requires. *People v. Jacobs*, 66 N. Y. 8.

In many cases the fine should not be greater than ten dollars, motion fees and disbursements. *King v. Flynn*, 37

Hun, 329, *quaere* as to what the law makers meant by making it mandatory upon the court to impose a fine of two hundred and fifty dollars in addition to the costs and expenses. As in *Meyers v. Dreyspring*, 52 N. Y. St. Rep. 520, the court held that the fine should not exceed sixty dollars for the violation of an injunction in parting with sixty dollars by the judgment-debtor. Where the court has power in punishing for contempt to impose as a fine an indemnity for legal expenses incurred in addition to those properly taxable, the amount of such indemnity must be ascertained by evidence, to which is to be applied the same rules of law as upon the trial of an action brought for an injury. The amount of such is in no sense in the discretion of the court, but the judgment of the court must be founded upon legal proof accordingly, (*Fenton v. Dempsey*, 15 Civ. Pro. Rep. 93; 22 Abb. N. C. 114), and in proceedings for contempt in supplementary proceedings to sustain the imposition of a fine for loss or injury caused thereby, the existence of the loss must first be proved by legal evidence. *Fall Brook Coal Co. v. Hecksher*, 4 N. Y. St. Rep. 657; 42 Hun, 534. And in all cases the amount of the loss and injury must be established by the same proof as in an action at law to recover the damages sustained; and the cost and expenses must be ascertained by the rate of compensation fixed by the statute for the services performed. *Dejonge v. Brennehan*, 23 Hun, 332; *Ludlow v. Knox*, 7 Abb. N. S. 411. So the court has no power to fine arbitrarily, or to take the opinion of the injured party as a standard, but the adjudication as to the amount must rest on the facts proved. *Simmonds v. Simmonds*, 6 Week. Dig. 263.

But it is not necessary that the order imposing the fine should in form adjudge that actual loss or injury has been sustained to the amount of the fine, it is sufficient if it appears that such loss has been suffered, nor is it essential to show that the loss or injury is irremediable and hopeless. *Clark v. Bininger*, 75 N. Y. 344; *Rugg v. Spencer*, 59 Barb. 383.

If the disobedience is willful, although no actual loss requiring indemnity is shown, it is criminal, and may be punished by a fine not exceeding two hundred and fifty

dollars, in addition to any fine as indemnity. *People v. Crompton*, 9 N. Y. 263.

But where the fine is arbitrarily imposed without regard to the legal loss or indemnity required, and above two hundred and fifty dollars and costs, and the accused is imprisoned under an order thereon, holding him until the fine is paid, *habeas corpus* will not release him. *Gallagher v. O'Neil*, 21 N. Y. St. Rep. 161; *Moffat v. Herman*, 116 N. Y. 131; 26 N. Y. St. Rep. 328.

18. Length of imprisonment.—Where the misconduct proved consists of omission to perform an act or duty which it is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it and paid the fine imposed. In such a case the order and the warrant of commitment, if one is issued, must specify the act or duty to be performed and the sum to be paid. In every other case, where special provision is not otherwise made by law, the offender may be imprisoned for a reasonable time, not exceeding six months, and until the fine, if any, is paid, and the order and the warrant of commitment, if any, must specify the amount of the fine and the duration of the imprisonment. Code, § 2285. A provision in an order adjudging a debtor in contempt and requiring him to obtain a reassignment of certain rights transferred prior to the judgment is unauthorized; such transfer can only be attacked by a creditor's bill. *Meyers v. Drey-spring*, 52 N. Y. St. Rep. 520. So a judge who makes an order requiring a judgment-debtor, who admits that he has in his possession money and property to an amount exceeding the judgment, to pay the judgment by a day fixed, cannot in the same order prescribe in advance the punishment to be inflicted if he fails to obey the order. He can only be punished upon conviction for contempt upon the return of an attachment or an order to show cause. *Tinker v. Crook*, 22 Hun, 579. Where the contempt consists of an affirmative act of resistance to the process of the court, an active effort to defeat its orders and make its judgment nugatory, "an actual interference" with an action or proceeding in the court, it may be punished by imprisonment for six months. *King v. Barnes*, 113 N. Y. 476; 23 N. Y. St. Rep. 263. Where the misconduct proved consists of

an omission to perform an act or duty which it is in the power of the offender to perform, the commitment need not specify the duration of the imprisonment, but only the act or duty to be performed and the sum to be paid. *Anon.* 18 Abb. N. C. 216. Where the offender complies with the order after he is adjudged in contempt the court has no power to imprison him, but may impose a fine of two hundred and fifty dollars. *Fenton v. Dempsey*, 26 N. Y. St. Rep. 243; 21 Abb. N. C. 291; 17 Civ. Pro. Rep. 388. The commitment of a witness for refusal to answer questions must limit the confinement to the time when the witness is willing to answer the questions that have been actually propounded to him, and for a refusal to answer which he has been convicted of contempt. *People v. Davidson*, 35 Hun, 471.

19. Jail Liberties.—A party committed for the non-payment of a fine imposed upon him for the breach of an injunction or other contempt must be confined within the wall of the prison. *In re Clark*, 20 Hun, 551; *People v. Bennett*, 4 Paige, 282; *People v. Cowles*, 4 Keyes, 38; *Egan v. Lynch*, 3 Civ. Pro. Rep. 236; *People v. Fancher*, 4 S. C. (T. & C.) 467.

20. Release of offender.—Where an offender imprisoned in contempt proceedings is unable to endure the imprisonment, or pay the sum, or perform the act or duty required to be paid or performed in order to entitle him to be released, the court or judge may, in its or his discretion, make an order directing him to be discharged from the imprisonment. Code, § 2286.

A person committed to jail for contempt in these proceedings cannot be admitted to bail pending an appeal from an order denying a motion to open his default and discharge him from custody. *Valentine v. Mandell*, 9 Civ. Pro. Rep. 155. The application for a discharge must be made on notice. *Strobridge v. Strobridge*, 21 Hun, 288. It seems that the power to discharge is given to any court having jurisdiction of contempt proceedings, notwithstanding section 2286 of the Code prescribes that in supplementary proceedings, where the commitment was made as prescribed in section 2457, the court out of which the execution was issued may make the order. *Moschell v.*

Boor, 50 N. Y. St. Rep. 238; *People ex rel. Grant v. Warner*, 20 id. 573; *Mitchel v. Hall*, 3 Law Bull. 23. Inability, voluntarily and intentionally created, does not entitle the applicant to the favorable consideration of the court. *Ryer v. Ryer*, 19 Week. Dig. 358; 67 How. Pr. 369.

21. **Undertaking as indemnity.**—Where a person arrested by virtue of a warrant of attachment has given an undertaking for his appearance and fails to appear on the return day of the warrant, the court may either issue another warrant or make an order directing the undertaking to be prosecuted, or both. Code, § 2288.

The order directing the undertaking to be prosecuted may direct the prosecution thereof by, and in the name of, any party aggrieved by the misconduct of the accused. In such a case the plaintiff may recover damages to the extent of the loss or injury sustained by him by reason of the misconduct, together with the costs and expenses of prosecuting the special proceeding in which the warrant was issued, not exceeding the sum specified in the undertaking. Code, §§ 2288, 2289.

CHAPTER XX.

PROPERTY EXEMPTED BY SECTIONS 1879 AND 2463 OF THE CODE.

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| <p>I. IN GENERAL.</p> <p>II. TWO CLASSES OF EXEMPTIONS UNDER CODE, §§ 1390-1391.</p> <p>2. Rights of the debtor.</p> <p>3. Householder—Definition of.</p> <p>4. Having a family for which he provides.</p> <p>5. Proceeds of exempt property—exempt when.</p> <p>III. MEANING OF WORD "NECESSARY" IN SECTION 1391 OF THE CODE.</p> <p>IV. JUDGMENT FOR PURCHASE-MONEY OF EXEMPT PROPERTY.</p> <p>6. In general,</p> <p>7. For work performed in the family as a domestic.</p> <p>8. Partnership property.</p> <p>V. CONTRACT NOT TO CLAIM EXEMPTION—EFFECT OF.</p> <p>9. Prospective agreement.</p> | <p>10. Waiver of exemption.</p> <p>11. Alimony—Exempt when.</p> <p>VI. EXEMPTIONS MUST BE CLAIMED—WHEN.</p> <p>12. Team.</p> <p>VII. IDENTITY OF PROPERTY EXEMPT—WHEN.</p> <p>VIII. EXEMPTION OF LIFE INSURANCE MONEY.</p> <p>IX. EXEMPTIONS, HOW AFFECTED BY FRAUD.</p> <p>X. MILITARY PAY, REWARDS, PENSIONS, ETC.</p> <p>13. In general.</p> <p>14. Property purchased with pension money.</p> <p>15. Pension money, after death of pensioner.</p> <p>16. Real estate.</p> <p>XI. ILLUSTRATIONS—EXEMPT PROPERTY.</p> |
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I. PROPERTY EXEMPTED BY SECTIONS 1879 AND 2463 OF THE CODE.

It is provided by section 2463 of the Code of Civil Procedure, that the article on proceedings supplementary to execution does not authorize the seizure of, or other interference with, any property which is expressly exempt by law from levy and sale by virtue of an execution.

At common law, neither a judgment-debtor nor his family had any way of exempting any portion of his property from execution for his or their benefit, so that any privileges that he may now have in that direction must be sought for in the statutory law, and in this state the laws which exempt from execution and judgment-debtor's personal property are to be found in the Code of Civil Procedure. Section 1390 of the Code provides that the following personal property, when owned by a householder, is exempt from levy and sale by virtue of an execution ; and

each movable article thereof continues to be so exempt, while the family, or any of them, are removing from one residence to another.

(1.) All spinning-wheels, weaving looms and stoves, put or kept for use in a dwelling-house, and one sewing-machine. (2.) Books not exceeding in value fifty dollars, also family pictures and school books. (3.) Seat or pew in a church. (4.) Ten sheep, with their fleeces, and the yarn or cloth manufactured therefrom; one cow; two swine; the necessary food for those animals; all necessary meat, fish, flour, groceries and vegetables actually provided for family use, and necessary fuel, oil and candles, for the use of the family for sixty days. (5.) The tools and implements of a mechanic not exceeding in value twenty-five dollars. (6.) All wearing apparel, beds and household furniture. *Lash-away v. Tucker*, 39 N. Y. St. Rep. 680. And section 1391 of the Code provides for an additional exemption of necessary household furniture, working tools and team, professional instruments, furniture and library, not exceeding in value two hundred and fifty dollars, and necessary food for the team for ninety days. The property mentioned in the last-named section is not exempt where the execution is issued upon a judgment, recovered wholly upon one or more demands, either for work performed in the family, as a domestic, or for the purchase-money of one or more articles exempt as prescribed in either section 1390 or 1391 of the Code.

Section 1392 of the Code provides that where the judgment debtor is a woman, she is entitled to the same exemptions from levy and sale, by virtue of an execution, subject to the same exceptions, as prescribed in sections 1390 and 1391 of the Code. It is not necessary that a woman should be a householder to be entitled to such exemptions. *Fink v. Fraenkle*, 39 N. Y. St. Rep. 195. The earnings of a debtor for his personal services, rendered within sixty days of the proceedings, are under certain circumstances exempt. Code, § 2463.

Thus, the harsh rule of the common law which stripped judgment-debtors of everything except the clothes upon their backs, has been mollified by statutory provisions, as a protection for poor and destitute families, to mitigate

the consequences of men's thoughtlessness and improvidence.

The word "wholly" has been added to section 1391 of the Code after "judgment recovered" in order to render final the ruling in *Hickox v. Fay*, 36 Barb. 9; and the words "one or more articles exempt as prescribed in this or the last section" having been substituted for the enumeration of the articles, in order to settle, in the affirmative, the disputed question whether one article of exempt property can be levied upon where the demand is for the purchase-money of another article of exempt property. *Hickox v. Fay*, 36 Barb. 9; *Smith v. Slade*, 57 id. 637; *Snyder v. Davis*, 1 Hun, 350; 3 S. C. (T. & C.) 596; 47 How. Pr. 147.

II. TWO CLASSES OF EXEMPTIONS UNDER CODE, §§ 1390-1391.

2. Rights of the debtor under.—There are two classes of exemptions provided for by the Code. One relates to certain articles which are specifically enumerated and absolutely exempted. Code, § 1390. The other is limited to the sum of two hundred and fifty dollars, and there may be claimed under it property of the kind mentioned in § 1391, to that amount, but to that amount only. The latter exemption is limited and indefinite, and where the debtor has property of that character of greater value than two hundred and fifty dollars, it is dependent upon his election as to the particular property that may be retained by him as exempt. If property consists of the articles mentioned in section 1390 of the Code, it is absolutely exempt if the owner is a householder, and the officer has no right to levy upon it. Thus, no article exempted by this section can be levied upon to satisfy any judgment whatever, not even though it be a judgment recovered for the purchase-price of the article itself. *Cox v. Stafford*, 14 How. Pr. 519. If, however, the property is of the description mentioned in section 1392 of the Code, the exemption is a qualified one and the debtor must claim it and notify the officer of his claim before he can properly maintain an action either for its conversion or to recover its possession, especially where there is other property to which such exemption might apply. *Russell v. Dean*, 30 Hun, 242; *Turner v.*

Borthwick, 20 id. 119; *Twinan v. Swart*, 4 Lans. 263; *Seaman v. Luce*, 23 Barb. 240; *Lockwood v. Younglove*, 27 id. 505; *Wilcox v. Howe*, 36 N. Y. St. Rep. 303.

3. Householder, definition of.—The term householder as used in the statute has a very well-defined meaning, and imports the master or head of the family who reside together and constitute a household.

It has been held that a person living in a hired house and keeping servants and boarders is a householder. *Hutchinson v. Chamberlain*, 11 N. Y. Leg. Obs. 248. But a man having a house and no family is not a householder. *Chamberlain v. Darrow*, 46 Hun, 48. The word "householder" does not simply signify a housekeeper, but imports the master or head of the family as well. The fact that a person has temporarily given up housekeeping does not deprive him of the benefits of the statutes. *Griffin v. Sutherland*, 14 Barb. 456.

4. Having a family for which he provides.—The exemptions under § 1391 of the Code are given not only to the householder, but one "having a family for which he provides." The terms of the statute referred to are in the alternative, and a person who has a family for which he provides, is as much within the provisions of the act, and entitled to the benefits conferred by it, as if he were, strictly speaking, a householder. *Cantrell v. Conner*, 51 How. Pr. 45.

Although section 1390 of the Code does not in words provide that the articles therein mentioned are exempt when owned by a man having a family for which he provides, unless he is a householder, the construction placed on that section by the courts give him such exemptions.

5. Proceeds of exempt property, exempt when.—Section 1394 of the Code provides that a right of action to recover damages, or damages awarded by a judgment, for taking or injuring personal property, exempt by law from levy and sale by virtue of an execution, are exempt for one year after the collection thereof, from levy and sale by virtue of an execution, and from seizure in any other legal proceeding. And see *Tillotson v. Wolcott*, 48 N. Y. 188.

III. MEANING OF THE WORD "NECESSARY" IN SECTION 1391 OF THE CODE.

In *Wolf v. Farley*, 40 N. Y. St. Rep. 808, the court say, that in *Wilcox v. Hawley*, 31 N. Y. 648, it was held that the word "necessary," as used in the statute, applies only to the household furniture, and qualifies the extent to which that is exempt. But all that the court in that case did say was: "The word necessary, as used in the statute, applies to the household furniture, and qualifies the extent of that furniture exempted. In *Knapp v. O'Neill*, 12 N. Y. St. Rep. 349, the court say: "We think the trial judge was correct in his instruction to the jury, that the burden of proof was upon plaintiff, in respect to the facts essential to carry the case within the provisions of the statute." Although in that case *Hardin, J.*, quotes the words of *Davies, J.*, in *Wilcox v. Hawley*, that the word "necessary," as used in the statutes, applies to the household furniture, and qualifies the extent of that furniture exempted.

Where a debtor desires to claim his earnings for his personal services rendered within sixty days next preceeding the levy of an attachment, the burden is on him to show that those earnings are necessary for the use of a family, wholly or partly supported by his labor. Code, § 2463; *Hancock v. Sears*, 93 N. Y. 79.

IV. JUDGMENT FOR PURCHASE-MONEY OF EXEMPT PROPERTY.

It is provided by section 1391 of the Code that the property mentioned in said section is not exempt as against an execution issued upon a judgment recovered wholly upon one or more demands, either for work performed in the family as a domestic, or for the purchase-money of one or more articles exempt as prescribed in that or by section 1390. Thus, any article exempted by section 1391 may be levied upon to satisfy the judgment recovered for the purchase-price of that article, or for the purchase-price of any other article exempted either by that section or section 1390, but no article exempted by section 1390 can be levied upon to satisfy any judgment whatever, not even though

it be a judgment recovered for the purchase price of that article itself. *Cox v. Stafford*, 14 How. Pr. 519. Thus, all the articles mentioned in section 1391 are exempt except for a debt contracted in the purchase of property which was itself exempt from execution while in the hands of the vendor before sale. *Kneettle v. Newcomb*, 22 N. Y. 253.

This clause was inserted for the further protection of poor and destitute families, and to allow a man who sells his last cow to collect the purchase-price of the purchaser out of his property exempted by section 1391. *Craft v. Curtiss*, 25 How. Pr. 163.

7. For work performed in the family as a domestic.—Property exempted by section 1391 of the Code can be taken upon an execution issued upon a judgment recovered wholly upon one or more demands for work performed in the family as a domestic.

8. Partnership property.—The provisions of the exemption act extend to property owned by the debtor as a member of a partnership. *Stewart v. Brown*, 37 N. Y. 350.

V. CONTRACT NOT TO CLAIM EXEMPTION.—EFFECT OF.

9. Prospective agreement.—It seems that a person contracting a debt cannot agree with the creditor that in case of non-payment he shall be entitled to levy his execution upon property exempt from levy by the general laws of the state. *Crawford v. Lockwood*, 9 How Pr. 547. The statutes which allow a debtor, being a householder and having a family for which he provides, to retain, as against the legal remedies of his creditors, certain articles of prime necessity to a limited amount, are based upon views of policy and humanity which would be frustrated if an agreement entered into in connection with the principal contract waiving such exemption could be sustained. A few words contained in any note or obligation would operate to change the law between those parties, and so far disappoint the intentions of the legislature. If effect shall be given to such contracts it is likely that they will be generally inserted in obligations for small demands, and in that way the policy of the law will be completely over-

thrown. Every honest man who contracts a debt expects to pay it, and believes he will be able to do so without having his property sold on execution. No one worthy to be trusted would, therefore, be apt to object to a clause subjecting all his property to levy on execution in case of non-payment. It was against the consequences of this overconfidence, and the readiness of men to make contracts, which may deprive them and their families of articles indispensable to their comfort that the legislature has undertaken to interpose. When a man's last cow is taken on an execution on a judgment rendered upon a contract in which there is a clause waiving its exemption, it is no sufficient answer to say that it was done pursuant to his consent freely given when he contracted the debt. The law was designed to protect him against his own improvidence in giving such consent. The statutes contain many examples of legislation based upon the same motives. The laws against usury, those of deeds given as security for the payment of a debt, and those which allow a redemption after the sale of land on execution. In these cases the law seeks to mitigate the consequences of man's thoughtlessness and improvidence, and it does not allow its policy to be evaded by any language which may be inserted in the contract. It is not always equally careful to shield persons from those acts which, instead of being promissory in their character and prospective in their operation, take effect immediately. One may turn out his last cow on execution, or he may release an equity of redemption, and he will be bound by the act. And while the statutes stands between an exempt homestead and a mortgage upon the same, given by the owner of the land subsequent to its becoming exempt, except such mortgage is given for the purchase-money of the property, there is no such statutory protection even for the chattels exempt under section 1390 of the Code of Civil Procedure, and there is no decided cases, so far as appears, as to whether such a mortgage of exempt chattels would be void as against public policy. It is said in *Kneettle v. Newcomb*, 22 N. Y. 251, that "in thus discriminating the law takes notice of the readiness with which sanguine and incautious men will make improvident contracts which look to the future for their

consummation, when, if the result were to be presently realized, they would not enter into them at all. If, with the consequences immediatly before them, they will do the act they will not generally be allowed to retract, it being supposed in such cases that valid reasons for the transaction may have existed, and that, at all events, the party was not under the influence of the illusion which distance of time creates.

10. Waiver of exemption.—A waiver is not, and bears no analogy to, a contract.

No consideration is necessary to support a waiver. It is in this respect like a gift. Gifts can only be made to take effect *in presenti*. Of course, then, a gift must be of something *in esse* at the time. To give implies *ex vi termini*, a present transfer of the thing. To waive, no less than to give, imports a present act. If I say, "I waive" some right which I may have next week, this can mean nothing more than when the time arrives I will not insist upon the right. It cannot extinguish a right not yet *in esse*. It may, if without consideration, be retracted at any time.

A right, not yet in being, but which depends upon a contingency, cannot be the subject of a waiver. There is no *estoppel in pais*; there is no fact involved in the transaction of which either party is ignorant. It is a matter of contract, and not a matter of fact. *Crawford v. Lockwood*, 9 How. Pr. 547.

11. Alimony.—Exempt when.—Alimony awarded to a wife cannot be regarded as an ordinary debt due by one person to another, which may be reached by judgment-creditors in the ordinary way. The nature of alimony must not be overlooked. It is not the wife's property, nor her separate estate. It is simply a provision compulsorily made for her support by the husband. The law thus enforces the obligation assumed by the husband at marriage, and the alimony becomes a substitute for the maintenance which is the wife's due, and which she would receive directly from the husband, and in his home, but for the dissolution of the marriage contract. This was the doctrine of the common law, and the rule was substantially codified both in the Revised Statutes and the Codes of Procedure. At common law alimony properly signified

nourishment or maintenance when strictly taken. *Godol*, Abb. 508. It was not a portion of the husband's estate assigned to the wife, and subject to her control or to be sold at her pleasure, but a provision for her support, to be continued during their joint lives, or so long as they live separate. *Wallingsford v. Wallingsford*, 6 Har. & J. 485. "Alimony," says Mr. Bishop, "is not a sum of money or a specific portion of the husband's estate given absolutely to the wife, but is a continuous allotment of sums payable at regular periods for her support from year to year." In *Daniels v. Lindley*, 44 Iowa, 567, it was said, that the claim of the wife for alimony was not in the nature of a debt, and that she was not a creditor of her husband. So in *Guenther v. Jacobs*, 44 Wis. 354, it was said, that alimony is not an estate, and, therefore, not separate property of the wife. It is an allowance for the maintenance of the wife, variable and revocable.

The language of the Code is equally explicit: "The court may, in the final judgment dissolving the marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff as justice requires, regard being had to the circumstances of the respective parties." Code, § 1759, subdivision 2. The maintenance of the children of the marriage and the support of the wife are thus treated as obligations of a like character, to be enforced, not as creditors enforce the contract obligations of their debtors, but by specially coercive proceedings looking not only to the sequestration of the husband's property but to compulsory payment from even his current earnings, and to imprisonment in case of disobedience to the judicial mandate. It is quite clear that the provisions thus made for the wife's support is non-assignable. And what, it may be asked, could an assignee of alimony take? Could he take a provision made for the support of the wife, payable from time to time *in futuro*, and determinable by the death meantime of either of the parties? And if he could take such a provision, will it be pretended that the assignment would carry with it the same right to enforcement, and the same remedies in that regard which the law has afforded to the wife? The question carries with it the negative

answer. In the case of *Stevenson v. Stevenson*, 34 Hun, 157, the judgment was recovered subsequently to the decree of divorce, and seems to have been for necessities furnished the wife upon the faith of the alimony judgment. It is reasonable that a provision made for the support of the wife and children should be charged with that very support furnished by a tradesman on the strength of the decree. But to charge the alimony provision with a judgment having no relation whatever to the wife's support would simply be to nullify the statute and to permit the wife to starve, while the husband, instead of supporting her, is forced to pay her old debts. Public policy also demands that a woman whose husband is bound to support her shall not become a public charge, and that the provision ordained by law shall be scrupulously applied to the single purpose for which it was intended. *Romaine v. Chauncey*, 39 N. Y. St. Rep. 480.

VI. EXEMPTION MUST BE CLAIMED WHEN.

12. Team.—A team consists of one horse or two horses, one mule or two mules, one ox or two oxen, together with the harness or yoke and the vehicle to which they are customarily attached for use. A vehicle or harness, if exempt, is exempt because it is embraced in the description of a team. *Brown v. Davis*, 9 Hun, 43. In *Wilcox v. Hawley*, 31 N. Y. 648, it was held that it was sufficient for the plaintiff to show that the horse claimed as exempt constituted his team, that he was a householder, and that his household furniture, working tools and team did not, in the aggregate, exceed in value the sum of two hundred and fifty dollars. In *Hoyt v. Van Alstine*, 15 Barb. 568, it was held that evidence that the plaintiff was a householder, having a family for which he provided, and that the mare was all the team he had, and that it was used in the prosecution of the business in which he was engaged, was enough to entitle him to the exemption.

In *Seaman v. Luce*, 23 id. 240, it appeared that the debtor had more than two horses, which were worth in the aggregate more than the exempt value fixed by the statute, and it was held that the officer levying on one of them was not a trespasser unless the debtor claimed at the time that the

horse levied on that it was exempt. In *Smith v. Slade*, 57 id. 637, it was held that it was not necessary for the plaintiff to show affirmatively that he had not other articles exempted by statute of the value of two hundred and fifty dollars or which, with the articles mentioned in the complaint, exceeded that sum. *Lockwood v. Younglove*, 27 Barb. 506, seems to hold the same doctrine. The case of *Frost v. Mott*, 34 N. Y. 253, related to property which was specifically and absolutely exempt under the Revised Statutes. In *Russell v. Dean*, 30 Hun, 242, a constable levied upon a span of mules owned and used by the debtor in his business of farming and boating. He was a householder and had no other team. It did not appear what other property he then had. He did not at the time the levy was made, or at any other time, claim that the mules were exempt. In that case the court say: "We think the correct conclusion is that it not having appeared either that the plaintiff had not other property exempt under section 1391 of the Code of the value of two hundred and fifty dollars, or that he at any time claimed the property in question to be exempt, such property must be deemed to have been in fact liable to execution. Assuming that he had other property which was exempt under section 1391 of the Code, he waived his claim to the statutory provision in his favor in respect to the property in question by omitting to assert it." In *Turner v. Borthwick*, 20 Hun, 119, it was held that all personal property of a judgment-debtor is liable, in the first instance, to levy and sale on execution, and that in some form the execution-debtor must make his claim to exemption to the officer making the levy. The court disposed of the case of *Frost v. Mott*, 34 N. Y. 253, by saying: "The language used by the judge to the effect that it was the officer's duty to select and leave with the debtor such exempt property as he was entitled to, does not appear to have been called for in the disposal of the case, and was not warranted by any fact shown to exist." In *Brooks v. Hathaway*, 8 Hun, 29, it was held that where the judgment-debtor has other property apparently exempt, or which might be exempt under this act, he must within a reasonable time after knowledge of the levy, make his election and give notice to the officer that he claims as

exempt the property levied upon. In *Wilcox v. Howe*, 36 N. Y. St. Rep. 303, the court says: "If it were to be held that an officer could not levy upon any property of the description mentioned in section 1391 of the Code without becoming liable to an action for its recovery, when no demand was made nor claim that it was exempt asserted by the owner, it would follow that all property of that character would be practically exempt from levy under an attachment, although it greatly exceeded in value the limit provided by that section." Where the contrary has been held, the property was either absolutely exempt or known by the officer to be exempt when the levy was made.

VII. IDENTITY OF EXEMPT PROPERTY — NECESSARY WHEN.

As a general rule property exempt from levy and sale on execution, only remains so so long as it maintains its identity and is kept intact. A horse, under certain circumstances, may be exempt, but if sold and the proceeds taken and invested in guns, they would not be exempt. *Salisbury v. Parsons*, 36 Hun, 17.

VIII. EXEMPTION OF LIFE INSURANCE MONEY.

The proceeds of a policy on the life of a husband for the benefit of his wife cannot be reached either by his creditors or hers. In *Baron v. Brummer*, 100 N. Y. 375, the court say: "Under these various provisions of the statutes, it was the intention of the legislature that such policies should not be subjected to the lien of creditors, either of the husband or the wife, as to the former by the express words of the statute, and as to the latter by the determination of the courts." Exemption laws are not designed to protect creditors or to advance their interests, but to furnish protection against their writs and actions. They are remedial in their nature and must be liberally construed, to advance their spirit and purpose, which are in the interest of humanity to protect families from improvidence and distress. *Austin v. McLaurin*, 16 N. Y. St. Rep. 806.

IX. EXEMPTIONS, HOW AFFECTED BY FRAUD.

It seems that where a debtor has reduced himself to exempt property, in order to defraud his creditors, he cannot

claim exemption for the property remaining unaffected by such transfers. *Bishop v. Johnson*, 15 N. Y. St. Rep. 579; *Brocket v. Watkins*, 21 Wend. 68.

X. MILITARY PAY, REWARDS, PENSIONS, ETC.

13. In general.—It is provided by section 1393 of the Code, that the pay and bounty of a non-commissioned officer, musician or private in the military or naval service of the United States, a land warrant, pension or other reward heretofore or hereafter granted by the United States, or by a state, for military or naval services; a sword, a horse, medal, emblem or devise of any kind presented as a testimonial for service rendered in the military or naval service of the United States; and the uniform, arms and equipments which were used by a person in that service, are exempt from levy and sale by virtue of an execution, and from seizure for non payment of taxes, or in any other legal proceedings.

14. Property purchased with pension money.—It has been seen that section 1393 of the Code excepts a pension from levy and sale by virtue of an execution, and from seizure for non-payment of taxes, or in any other legal proceedings. That statutes of this character are to be liberally construed, with a view of promoting the object of the legislature, is established by a uniform course of authority, and that their force and effect are not to be confined to the literal terms of the act, has also been held in numerous cases. Like other statutes the section in question must be construed according to the meaning and intent of the lawmakers, and so to effectuate their intention so far as the language of the act will permit it to be done. In the *Yates County Nat. Bank v. Carpenter*, 30 N. Y. St. Rep. 121, the court say: "Did the legislature intend to limit the force of their exemption to a pension so long only as it remained an obligation of the government, or consisted of cash in the hands of the pensioner, or did they also intend to protect it after it had been expended in the purchase of articles of property designed to administer to the comfort of and support of such pensioner and his family? If the latter was intended, we must ascribe to the lawmakers the absurd intention of granting pensions for the purpose of satisfying claims against pensioners, and

not to provide for the care and comfort of invalid or aged soldiers. If the soldier is not protected in the act of exchanging his pension for the necessities of life, its only effect would be to enable his creditors to take it in satisfaction of their claims. No benefit is conferred if the protection is not extended beyond the possession of the money itself, for its only value consists in its purchasing power, and if the soldier is deprived of that, the pension might as well, so far as he is concerned, have remained ungranted. The plain purpose of the act was to promote the comfort of the soldier, to secure to him the bounty of the government free from the claims of creditors, and to insure him and his family a safe, although modest, maintenance so long as their needs required it. We entertain no doubt that where the receipts from a pension can be directly traced to the purchase of property, necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt under the provisions of the Code. Where such moneys can be clearly identified, and are used in the purchase of necessary articles, or are loaned or invested for the purpose of increase or safety, in such form as to secure their available use for the benefit of the pensioner in time of need, we do not doubt but that they come within the meaning of the statute. But where they have been embarked in trade, commerce or speculation and become mingled with other funds so as to be incapable of identification or separation, we do not doubt but the pensioner loses the benefit of the statutory exemption."

15. Pension money after death of pensioner.—Section 4718 of the United States Revised Statutes provides that, "If any pensioner has died, or shall hereafter die, * * * his widow, or if there is no widow, the child or children of such pensioner, under the age of sixteen years, shall be entitled to receive the accrued pension to the date of the death of such person. Such accrued pension shall not be considered as a part of the assets of the estate of deceased, nor liable to be applied to the payment of the debts of said estate in any case whatever, but shall inure to the sole and exclusive benefit of the widow or children."

This section only exempts the "accrued pension" not received by the pensioner. It seems that the exemption

created by section 1393 of the Code has no application after the pensioner's death. *Matter of Barber*, 20 N. Y. St. Rep. 136.

16. Real estate.—Section 1395 of the Code exempts land set apart as a family or private burying ground, as therein prescribed, when the owner has complied with the provisions of section 1396, and section 1397 exempts a lot of land, with the buildings thereon not exceeding in value one thousand dollars, owned and occupied as a residence by a householder having a family, or by a married woman, provided the owner has complied with the provisions of section 1398, and the debt or debts were not contracted for the purchase-money of the property. This exemption continues after the death of the person in whose favor the property was exempted, as follows: If the decedent was a woman it continues for the benefit of her surviving children, until the majority of the youngest surviving child. If the decedent was a man, it continues, for the benefit of his widow and surviving children, until the majority of the youngest surviving child and until the death of the widow. But the exemption ceases earlier if the property ceases to be occupied as a residence, by a person for whose benefit it may so continue. But a suspension of the occupation thereof for a period not exceeding one year, which occurs in consequence of injury to or destruction of the dwelling house upon the premises, does not affect the exemption. Code, §§ 1400, 1401. When the value of the homestead exceeds one thousand dollars in value, the surplus cannot be reached by an attachment or execution, but only by a creditors' bill after the return of an execution unsatisfied. *Id.*, § 1402. Land purchased with pension money is also exempt. Code, § 1393. *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550; 30 N. Y. St. Rep. 121.

XI. ILLUSTRATIONS—EXEMPT PROPERTY.

The fleeces, or the yarn or cloth manufactured from the fleeces of ten sheep, are exempted from execution while in the hands of a householder, whether he be or be not the owner of the sheep from which it was taken. *Hall v. Penny*, 11 Wend. 45; Code, § 1390, subd. 4.

The restriction to sixty days in subdivision 4 of section 1390, only applies to fuel, oil and candles. *Farrel v. Higley*,

Hill & Denio, 88. In the Matter of Edlunds, 35 Hun, 367, it was held that a cheap watch and chain, a trunk and the necessary clothing of an unmarried man, who was a clothing cutter, were exempt. But see *The Deposit Nat. Bank v. Wickham*, 44 How. Pr. 421, and *Bitting v. Vandenburg*, 17 id. 80. A wagon is a part of a team, and as such is exempt. *Dains v. Prosser*, 32 Barb. 290. So is a sleigh and harness. *Smith v. Slade*, 57 Barb. 637; *Flint v. Sargent*, 6 Week. Dig. 339; *Wolf v. Farley*, 40 N. Y. St. Rep. 808. It seems that a threshing machine is not exempt. *Ford v. Johnson*, 34 Barb. 364. Professional books and surgical instruments may be exempt. *Robinson's case*, 3 Abb. 466. So may shares in a law institute. *Keiher v. Shipherd*, 4 Civ. Pro. Rep. 274.

"Wheat" is not "flour" within the meaning of the words "flour and vegetables actually provided for family use. *Salisbury v. Parsons*, 36 Hun, 12. The father and husband who had left the state, leaving his wife and children living together, is a "householder." *Woodward v. Murray*, 18 John. 400.

The necessary wearing apparel of every debtor is exempt from levy and sale on execution. *Bumpas v. Maynard*, 38 Barb. 626. A non-resident is entitled to the exemption laws. *Bunn v. Fonda*, 2 Code Rep. 70. The exemption in the statute was not made to depend on the pecuniary ability of the debtor. *Smith v. Slade*, 57 Barb. 637; *Reinsche v. Flecke*, 35 N. Y. Supr. 491. Where a judgment-debtor has three horses, or two cows, or twenty sheep, and some of the property is levied upon, the debtor may at the time of the levy or within a reasonable time after he has notice thereof, elect to claim two of such horses as exempt. If he fails to make such election he cannot maintain replevin against the officer. *Seaman v. Luce*, 23 Barb. 240. The debtor may claim any piece of property not exceeding in value two hundred and fifty dollars. *Firmin v. Mallory*, 33 N. Y. Supr. 382; *Brooks v. Hathaway*, 8 Hun, 290.

Potatoes and other vegetables planted for family use are exempt from execution before they are taken from the ground, the same as when taken out of the ground and laid up in store. *Carpenter v. Herrington*, 25 Wend. 370.

CHAPTER XXI.

REVIEW OF ORDERS.

I. ORDERS IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

1. In general.

2. Review of orders in supplementary proceedings.

3. Discretionary orders.

4. Illustrations.

1. ORDERS IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

1. In general.—Proceedings for contempt are themselves special proceedings, independent of the proceedings in which they may be taken, and an order made therein cannot be regarded as an order in the course of the original proceedings. A proceeding for contempt is not governed by section 2433 of the Code of Civil Procedure. *Moschell v. Boor*, 50 N. Y. St. Rep. 238. Section 2433 of the Code of Civil Procedure, does not permit of an appeal from an order made by a judge, directly to the general term, but the mode of review prescribed by that section has no application to an order made in proceedings to punish for contempt, as the provisions of that section are limited to orders which affect only parties to the pending proceeding. It seems that an appeal from an order in contempt proceedings may be taken under section 1348. Section 2457 provides that a person in contempt may be punished by the judge, or by the court out of which the execution was issued, and section 1348 provides that an appeal may be taken to the general term, from an order, made upon notice, by a judge out of court. But no appeal from an order will be entertained until it is entered and filed, together with the moving papers, with the clerk, and the order and the motion papers must be produced to the court on hearing the appeal. *Gallt v. Finch*, 24 How. Pr. 193; *Pool v. Safford*, 10 Hun, 497. An appeal will not lie to general term from an order granted *ex parte*; such order can be reviewed in the first instance only by a motion, on notice to vacate or modify it, and the order granting or denying such motion is appealable. *Matter of Dunn*, 37 N. Y. St. Rep. 802.

2. Review of orders in supplementary proceedings.—Section 2433 of the Code provides that an order, made by a judge, out of court, may be vacated or modified by the judge who made it, as if it was made in an action; or it, or the order of the judge, vacating or modifying it, may be vacated or modified, upon motion, by the court out of which the execution was issued. Thus, where the execution was issued out of a county court upon a transcript from a justice's judgment, an appeal from an order, made in the course of the proceedings, may be taken in like manner as if the order was made in an action brought in the county court. Code, § 2433; *Billington v. Billington*, 16 Civ. Pro. Rep. 56.

An appeal does not lie, in the first instance, from an order made on notice to a judge under either sections 2435, 2436, 2437, 2438, 2441, 2446, 2447, 2449, 2450, 2451, 2454, 2455, 2456 or 2464 of the Code of Civil Procedure. *Moschell v. Boor*, 50 N. Y. St. Rep. 328.

To get rid of an order improperly made in a litigated motion by a judge at chambers, the aggrieved party must make a motion to the court out of which the execution was issued, and either party may appeal to the general term from the order made on such motion. Code, §§ 1347, 2433.

3. Discretionary orders.—In *Martin v. Windsor Hotel Co.*, 70 N. Y. 101, 104, the court construes the practice in cases of appeal from discretionary orders, and say: "It is claimed that a substantial right, within the meaning of the Code, is an absolute right, and that a matter which is discretionary is not a substantial right, and hence not appealable to the general term. There are judicial expressions made during the earlier period of the Code which favors this view, but it is an erroneous construction, and it has been settled that the general term may review orders that affect substantial rights, although discretionary.

Denio, J., in 29 N. Y. 418, in defining a substantial right, distinguished it from a merely personal matter or right.

It is only necessary that the order, to be appealable, must affect a substantial interest—a matter of substance and not of mere form—and it may be such an order, and yet be discretionary. The Code recognizes that an order affecting a substantial right may be discretionary, by providing that an appeal will lie to the court of appeals in certain cases

from an order affecting a substantial right "not involving any question of discretion." It has been urged that as the court of appeals will not review a discretionary order, the general term has, therefore, no power to review a discretionary order. The answer to this is that the court of appeals refrain from reviewing such orders when discretionary, not from any prohibition implied by the words "substantial rights," but from the constitution and functions of the court as an appellate tribunal restricted to a review of questions of law only. While the general and special terms of the supreme court are but different parts of the same court, of equal original jurisdiction, and the former can review and correct orders made by the latter, whether discretionary or not, provided they affect matters of substance. *Howell v. Mills*, 53 N. Y. 322.

4. Illustrations.—In *Levy v. Beacham*, 46 N. Y. St. Rep. 51, the appeal was from an order denying a motion to set aside an order for examination of the judgment-debtor in aid of execution. In *Lingsweiler v. Lingsweiler*, 29 id. 354, the appeal was by the judgment-creditor from an order vacating an order for the examination of a third person. The motion to vacate was made by the judgment-debtor, who had not been called into the proceeding by notice required by the court. Code Civ. Pro., §§ 2441, 2447.

In *Arnot v. Wright*, 29 N. Y. St. Rep. 425, the appeal was from an order of a special term, denying the judgment-debtor's motion to set aside an order for his examination. In *Kelly v. Levy*, id. 659, the appeal was from an order denying a motion made by a receiver to compel a judgment-debtor to deliver up his books. In *Terry v. Bange*, 30 id. 285, the appeal was from an order denying a motion made by the judgment-debtor to set aside an order appointing a receiver.

In *Frost v. Craig*, id. 848, the appeal was from an order directing the judgment-debtor to deliver property to the receiver, where the title to the property was disputed.

In *Marshall v. Link*, 36 id. 60, the appeal was from an order refusing to set aside an order for a second examination of the judgment-debtor, on the ground of jurisdictional defects.

In *Peck v. Baldwin*, 34 id. 511, the appeal was from an order denying a motion made by the judgment-debtor to set aside an order for examination, and an order appointing a receiver. In *Conyningham v. Duffy*, id. 736, the appeal was from an order denying a motion made by the judgment-debtor to set aside an order for examination. In *Grinnell v. Sherman*, 33 id. 27, the appeal was from an order denying a motion by the judgment-debtor to vacate an order for the examination of a third person, and for the appointment of a receiver. In the above cases no question seems to have been raised as to the regularity of the appeal. In *Schenck v. Erwin*, 38 id. 603, the appeal was from an order vacating an order for an examination of a third party. In that case the objection that the order was not appealable was duly raised, and overruled. In *Leonard v. Bowman*, 40 id. 139, the appeal was from an order vacating an order for the examination of a third party. In *Baumler v. Ackerman*, 43 id. 87, the appeal was from an order vacating an order for examination.

In *Waldron v. Walker*, id. 605, the appeal was from an order vacating an order for the application of money on the judgment-creditor's judgment. The appeal in *Schenck et al. v. Erwin et al.*, id. 862, was similar to that in *Waldron v. Walker*, and was to determine the jurisdictional question as to the right of a county judge of a county other than that of the debtor's residence to grant a third party order for examination, and see *McGuire v. Hudson*, 41 id. 295.

FORMS.

1.

..... COURT—COUNTY OF

IN THE MATTER OF THE EXAMINATION OF "E. R. B.," A JUDGMENT-DEBTOR IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION UPON A JUDGMENT ENTITLED
SUPREME COURT
W. C. S.
v.
E. R. B.

Affidavit for order for examination after return of execution. Code, § 2435.

County of....., ss.:

....., being duly sworn, says he is the judgment-creditor hereinafter mentioned, (or that he is assignee of the judgment hereinafter mentioned), (or attorney of record for the judgment-creditor herein), (or executor of the last will and testament of the judgment-creditor hereinafter mentioned). That a judgment was duly recovered recovered on the day of, 189., in the supreme court of county in an action wherein was plaintiff, and was defendant, upon personal service of the summons therein upon the defendant, (or upon the personal appearance of the defendant or plaintiff), (or upon confession), for the sums of \$....., (or for a sum not less than twenty-five dollars). That said judgment was duly docketed in the office of the clerk of county, on day of, 189., and a transcript of said docket duly filed in the office of the clerk of county, on the day of, 189.. (That afterwards and on or about the day of, 189., the said judgment-creditor duly sold and assigned said judgment to, who is now the owner thereof.) (That thereafter the said judgment-creditor died at, intestate), (leaving a last

will and testament), and letters of administration were thereafter duly issued to, who duly qualified and entered upon the duties of his office.

That an execution against the property of the said judgment-debtor was thereafter and within five years from the time of docketing of said judgment, (or within five years from the time of entering an order granting leave to issue an execution thereon), duly issued thereon and delivered to the sheriff of, where the judgment-debtor then resided and still resides or where the judgment-debtor now has a place for the regular transaction of business in person), (or where the judgment-roll is filed), and that said execution has been duly returned by the sheriff, wholly unsatisfied, (or partly unsatisfied, and there is still due upon said judgment the sum of \$.....), and the said judgment remains wholly unpaid. That the first execution issued upon said judgment was returned within ten years last past. That no previous application has been made for the order asked for herein, and that the deponent is authorized to make this affidavit.

Sworn to before me this day of, 189..

.....

2.

COUNTY COURT—COUNTY OF.....

IN THE MATTER OF THE EXAMINATION OF "E. R. B.," A JUDGMENT-DEBTOR IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION UPON A JUDGMENT ENTITLED

COUNTY COURT.

W. C. S.

v.

E. R. B.

Affidavit for order after return of execution on judgment of inferior court.

County of....., ss. :

....., being duly sworn, says he is the judgment-creditor hereinafter mentioned, (or assignee of the judgment hereinafter mentioned), (or executor or administrator of the judgment-creditor hereinafter mentioned), (or

attorney for the judgment-creditor hereinafter mentioned). That a judgment was duly recovered on the day of, 189.., in a justice's court of county, before, Esq., a justice of the peace of the town of, in an action wherein was plaintiff, and was defendant; upon the judgment-debtor's appearance, (or upon the personal service of the summons therein upon the defendant), for the sum of dollars, (or for not less than the sum of twenty-five dollars). That a transcript of said judgment was duly filed in the office of the clerk of county, on the day of, 189.., and within six years from the date of its recovery, and said judgment was on said date duly docketed in said county clerk's office. That afterwards, and within five years from the time said judgment was docketed in said clerk's office, an execution against the property of the said judgment-debtor was duly issued by the clerk of the said county upon said judgment, and delivered to the sheriff of county, where the said judgment-debtor then resided, and yet resides, (or where the said judgment-debtor has a place for the transaction of business in person); that afterwards the said sheriff duly returned said execution wholly unsatisfied, and the said judgment remains wholly unpaid (or partly unsatisfied and there is still due upon said judgment the sum of \$.....). That the first execution issued upon said judgment was returned within ten years last past. That no previous application has been made for the order asked for herein. That deponent is authorized to make this affidavit.

Sworn to before me this day of, 189..

.....

3.

..... COURT.

IN THE MATTER OF THE EXAMINATION OF "E. R. B.," A JUDGMENT-DEBTOR, IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION UPON THE APPLICATION OF "W. C. S." UPON A JUDGMENT ENTITLED

..... COURT.
W. C. S.
v.
E. R. B.

Affidavit for warrant for examination. Code, § 2437.

STATE OF NEW YORK, }
..... County. } ss. :

....., being duly sworn, says that he is the judgment-creditor herein mentioned. That judgment was duly rendered on the day of, 189., in the court of county, in an action wherein was plaintiff, and was defendant, in favor of the said against the said for the sum of \$...... upon the personal service of the summons in the action upon the judgment-debtor (or upon the said judgment-debtor's appearance) as appears by the judgment-roll therein, filed in the office of the clerk of the said county of, reference to which is hereto had, and the same is made a part of this affidavit. That the said judgment was duly docketed and the judgment-roll duly filed in the office of the clerk of on the day of 189.. (That a transcript of said docket was, on the day of, 189., duly filed and the judgment duly docketed in the office of the clerk of county.) That within five years after the original entry of said judgment, and on the day of, 189., an execution was duly issued out of said court, it being a court of record, upon said judgment against the property of the said, judgment-debtor, and de-

livered to the sheriff of county, where the said judgment-debtor then resided, and still resides, (or where the judgment-roll is filed or, in case of concealment, where the judgment-debtor has a place for the transaction of business in person.) That said execution was duly returned by said sheriff wholly unsatisfied (or partly unsatisfied). That ten years have not elapsed since the return of the first execution upon said judgment, (or that the said execution is now in the hands of the sheriff unreturned), and the said judgment remains wholly unpaid (or there is still unpaid upon said judgment the sum of \$.....) Deponent further says, that said, judgment-debtor, has property not exempt from these proceedings by section 2463 of the Code of Civil Procedure, viz. : That on the day of 189., the judgment-creditor caused a demand to be made by upon said judgment-debtor to apply his said property to the satisfaction of said judgment. (A copy of which said demand is hereto annexed and forms a part of this affidavit.) That the said judgment-debtor refused and neglected, and still refuses and neglects, to apply his said property as thereby requested. That said was duly authorized to make such demand for the judgment-creditor, and was present to receive said property or an assignment thereof. That said judgment-debtor unjustly refuses to apply his property towards the satisfaction of said judgment, as deponent is informed and believes, and that no previous application for a warrant herein has been made to any judge.

That no order to examine the judgment-debtor has been granted. Deponent further says: That the judgment-debtor has for last past resided at that on or about the day of 189., the said debtor informed deponent that he was about to leave this state and go to the state of That the judgment-debtor has for the last been employed as a at, but has resigned his position and is disposing of his and is about to leave, and that on the day of 189., deponent was informed by

....., the wife of the said judgment-debtor, that he was going to leave this state and go to in the state of (or that the judgment-debtor has for years last past resided at, that for the last ten days deponent has often inquired for the said debtor at his said residence and deponent has not been able to find him there, although deponent has often seen the said debtor at or near his said residence while deponent was going towards his said residence.)

Deponent further says: That there is danger that the said judgment-debtor will leave the state (or conceal himself), and that there is reason to believe that he has property which he unjustly refuses to apply to the payment of said judgment.

Sworn to before me this day of 189..

.....

4.

.....COURT.

IN RE EXAMINATION OF "E. R. B."
A JUDGMENT-DEBTOR, IN PRO-
CEEDINGS SUPPLEMENTARY TO
EXECUTION, UPON THE APPLICA-
TION OF "W. C. S." A JUDGMENT-
CREDITOR, UPON A JUDGMENT
ENTITLED

Warrant for examination un-
der Code, §§ 2437, 2438.

.....COURT.

W. C. S.

v.

E. R. B.

The people of the State of New York to the sheriff of any county where....., the judgment-debtor herein, may be found :

It having been made to appear to me by the affidavit of that judgment was rendered on the..... day of....., A. D. 189., in the.....court of county, in an action wherein..... was plaintiff, and.....was defendant, in favor

of the said against the said
 for the sum of \$..... (or for a sum not less than twenty-five dollars), upon the personal service of the summons in the action upon the judgment-debtor (or upon the said judgment-debtor's appearance in the action), and that the judgment-roll therein was duly filed and the judgment duly docketed in the office of the clerk of county, on the day of, 189.., as appears by the judgment-roll filed in the office of the clerk of this court. That an execution against the property of the said, judgment-debtor, was, within five years from the original docketing of said judgment, duly issued upon the aforesaid judgment, out of a court of record, to the sheriff of the county of, where the said judgment-debtor, ..., then resided and yet resides (or has at this time a place for the regular transaction of business in person) (or where the judgment-roll is filed), and that such execution has been returned by the said sheriff, wholly unsatisfied or partly unsatisfied.

That ten years have not elapsed since the return of the first execution issued upon said judgment, and that said judgment still remains wholly unpaid (or that there still remains unpaid upon said judgment the sum of \$....).

And it further appearing by said affidavit to my satisfaction that there is danger that the said judgment-debtor will leave the state or conceal himself, and that there is reason to believe that he has property not exempt from these proceedings by section 2463 of the Code of Civil Procedure, which he unjustly refuses to apply to the payment of such judgment.

You are hereby required to arrest said judgment-debtor and bring him before me, (or bring him before at)

Witness my hand this day of, 189..

....., Judge.

5.

..... COURT.

IN RE EXAMINATION OF "E. R. B.,"
A JUDGMENT-DEBTOR IN PROCEED-
INGS SUPPLEMENTARY TO EXECU-
TION UPON THE APPLICATION OF
"W. S. C." UPON A JUDGMENT
ENTITLED

..... COURT.
W. S. C.
v.
E. R. B.

Affidavit for order that third
party pay over money, etc.
Code, § 2446.

..... County, ss.:

..... being duly sworn, says he is the
..... herein mentioned; that heretofore and
on the day of, 189, upon the application
of deponent, an order herein was duly granted by
....., judge, for the examination of the judgment-
debtor under section of the Code of Civil Pro-
cedure, which said order was on the day of,
189., duly served upon the said judgment-debtor, a copy
of which said order is hereto annexed and forms a part
of this affidavit.

That of is indebted to the
judgment-debtor in the sum of \$....., and that no re-
ceiver has been appointed in these proceedings, nor has any
receivership been extended to these proceedings. That no
previous application for an order permitting said
..... to pay the said debt which he owes the judgment-
debtor herein to the sheriff has been made to any judge.

Sworn to before me this day of, 189..

.....

6.

..... COURT.

IN RE EXAMINATION OF "E. R. B.,"
A JUDGMENT-DEBTOR IN PROCEED-
INGS SUPPLEMENTARY TO EXECU-
TION UPON THE APPLICATION OF
.....

Order that third party pay his
debt to sheriff. Code, § 2446.

It having been made to appear to me by the affidavit of
....., that proceedings have been heretofore
commenced under section 2435 of the Code of Civil Pro-
cedure for the examination of a judg-
ment-debtor, and that no receiver has been appointed in
said proceedings, nor has any receivership been extended to
such proceedings, and that is indebted to
the said judgment-debtor in the sum of \$....., not ex-
ceeding the sum which shall satisfy the execution in said
proceedings. Leave is, therefore, hereby given permitting
the said to pay the said to the sheriff
of county.

....., Judge.

Dated, 189..

7.

..... COURT.

IN THE MATTER OF THE EXAMINA-
TION OF "E. R. B." A JUDG-
MENT-DEBTOR, IN PROCEEDINGS
SUPPLEMENTARY TO EXECUTION
ON A JUDGMENT ENTITLED.
SUPREME COURT.

W. C. S.

v.

E. R. B.

Order for examination of
judgment-debtor after re-
turn of execution. Code,
§ 2436.

It having been made to appear to me by the annexed
affidavit of that judgment was rendered

on the day of, 189., in the supreme court of county, in an action wherein "W. C. S." was plaintiff, and "E. R. B." was defendant, in favor of the said against the said for the sum of \$..... (or for a sum not less than twenty-five dollars).

Upon the personal appearance of the said judgment-debtor (or upon the personal service of the summons upon him), as appears by the judgment-roll filed in the office of the clerk of the said county of That the said judgment was duly docketed in the office of the clerk of, on the day of, 189... (That a transcript of said judgment was afterwards duly filed in the office of the clerk of the county of) And that afterwards, and within five years from the time said judgment was docketed, an execution against the property of the said judgment-debtor was duly issued out of a court of record upon said judgment to the sheriff of the proper county, and that such execution has been returned by the said sheriff unsatisfied. That the first execution issued upon said judgment was returned within the past ten years, and that said judgment remains unpaid as stated in said affidavit.

I do, therefore, hereby order that it be referred to, Esq., counselor of, N. Y., and I do hereby appoint the said a referee in these proceedings, with the power and subject to the limitations prescribed by sections 2442-2444 of the Code of Civil Procedure, to examine the judgment-debtor and such witnesses as may be offered by the respective parties, and reduce their examination to writing. I do further order and direct the said, judgment-debtor, to attend and submit to an examination concerning his property before said referee at, in the of, N. Y., on the day of 189., at o'clock in the noon (or at such time and place as the said referee shall by his summons appoint and direct), and for that purpose to appear before said referee from time to time as he shall direct and appoint.

And the said is hereby forbidden from making or suffering any transfer or other disposition of or

interference with the property of, or in which has any interest, legal or equitable, and not exempt by law as provided by section 2463 of the Code of Civil Procedure, until further direction in the premises.

Dated the day of, 189..

....., Judge.

8.

..... COURT.

IN THE MATTER OF THE EXAMINATION OF "E. R. B.," A JUDGMENT-DEBTOR, IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION UPON A JUDGMENT ENTITLED COUNTY COURT.

W. C. S.

v.

E. R. B.

Order for examination of judgment-debtor after return of execution on judgment of inferior courts. Code, § 2436.

It having been made to appear to me by the annexed affidavit of....., that judgment was rendered on the day of....., 189.., in a justice's court of..... county, by and before....., Esq., a justice of the peace in and for the.....of.....in said county, in an action wherein.....was plaintiff, and.....was defendant, in favor of the said against the said.....for the sum of \$.....(or for a sum not less than twenty-five dollars), upon the personal service of the summons upon the judgment-debtor (or upon the personal appearance of the judgment-debtor), as appears to us by the judgment docket of the said justice. That a transcript of said judgment was within six years from the time of the rendering of the said judgment, duly filed in the office of the clerk of the county of.....on the.....day of....., 189.. And said judgment then duly docketed therein against the said judgment-debtor, and that an execution against the property of the said judgment-debtor was duly

issued out of the county court of said county of.....
 by the clerk of said county to the sheriff of the said county
 of.....upon the aforesaid judgment, within five
 years from the date of its said docket in said clerk's office,
 and that such execution was afterwards duly returned by
 the said sheriff.....unsatisfied, and that said judg-
 ment still remains unpaid. That the first execution issued
 upon the aforesaid judgment, by the clerk of the county
 where the transcript was filed, was returned within the past
 ten years as stated in said affidavit.

I do, therefore, hereby order that it be referred to
, Esq., counselor, or....., N. Y.,
 and I do hereby appoint the said.....a referee
 in these proceedings, with powers and subject to the limita-
 tions prescribed by sections 2442-2444 of the Code of Civil
 Procedure, to examine the judgment-debtor and such wit-
 nesses as may be offered by the respective parties, and re-
 duce their examination to writing.

I do further order and direct the said.....,
 judgment-debtor, to attend and submit to an examina-
 tion concerning his property, before said referee at.....
 in the.....of....., N. Y., on the.....day
 of....., 189., at.....o'clock in the.... noon
 (or at such time and place as the said referee shall by his
 summons appoint and direct), and for that purpose to ap-
 pear before said referee from time to time as he shall direct
 and appoint. And the said.....is hereby for-
 bidden from making or suffering any transfer or other
 disposition of or interference with the property of
, or in which.....has any in-
 terest, legal or equitable, and not exempt by law as provided
 by section 2463 of the Code of Civil Procedure, until further
 direction in the premises.

Dated the.....day of....., 189..

....., Judge.

9.

.....COURT.

IN RE EXAMINATION OF "E. R. B."
A JUDGMENT-DEBTOR IN SUPPLE-
MENTARY PROCEEDINGS, UPON
THE APPLICATION OF "W. C. S."

Order for undertaking by
party arrested for examina-
tion. Code, § 2440.

A warrant having been heretofore issued by me under section 2437 of the Code of Civil Procedure for the arrest of, a judgment-debtor, and the said judgment-debtor having been arrested upon said warrant, and brought before me, and it appearing to my satisfaction, upon a preliminary examination of the said judgment-debtor, that there is danger that he will leave the state or conceal himself, and that he has property which he has unjustly refused to apply to the satisfaction of the judgment, for the satisfaction of which these proceedings were instituted. Now, therefore, I do hereby order and direct the said judgment-debtor to execute and deliver to, the judgment-creditor, within ten days from the time of the service of this order upon him, an undertaking in the penal sum of \$. with sureties, conditioned that he will from time to time, as the judge directs, attend before the judge or before a referee appointed, or to be appointed in the proceedings; and that he will not, until discharged from arrest by virtue of the warrant, dispose of any of his property, which is not exempt from seizure by section 2463 of the Code of Civil Procedure.

Dated day of, 189..

....., Judge.

10.

..... COURT.

IN RE EXAMINATION of "E. R. B.,"
 A JUDGMENT-DEBTOR IN PROCEED-
 INGS SUPPLEMENTARY TO EXECU-
 TION ON THE APPLICATION OF
 "W. C. S." UPON A JUDGMENT
 ENTITLED

..... COURT.

W. C. S.

v.

E. R. B.

Undertaking by party ar-
 rested for examination.
 Code, § 2440.

Know all men by these presents: That we
 of, by occupation a, and
 of, by occupation a,
 are held and firmly bound unto in the
 sum of \$....., to be paid to the said,
 for which payment well and truly to be made, we bind our-
 selves, our heirs and representatives, jointly and severally.

Sealed with our seals; dated the day of,
 189..

WHEREAS, The above bounden was here-
 tofore duly arrested upon a warrant as prescribed by sec-
 tion 2437 of the Code of Civil Procedure, and whereas, by
 an order made by on the day of
, 189.., in the matter of the examination
 of in proceedings supplementary to exe-
 cution upon a judgment entitled court, "W.
 C. S." against "E. R. B.," the above bounden
 was required to give an undertaking as prescribed
 by section 2440 of the aforesaid Code. Now, therefore, the
 conditions of this obligation are such that if the said
 shall and will from time to time, as the judge
 directs, attend before the said judge, or before a referee ap-
 pointed, or to be appointed by the said judge, in the pro-
 ceedings; and shall not, until discharged from arrest by
 virtue of the aforesaid warrant, dispose of any of his prop-
 erty which is not exempt from seizure by section 2463 of

the Code of Civil Procedure, then this obligation to be void, otherwise to remain in full force and effect.

Sealed and delivered in presence of [L. s.]

[L. s.]

[L. s.]

STATE OF NEW YORK, }
County of, } ss.:

..... above named being duly and severally sworn, says each for himself that he is a resident of, and a holder in the state of New York, and is worth the sum of \$..... over and above all debts and liabilities he owes or has incurred, and exclusive of property exempt by law from levy and sale under execution.

Severally sworn to before me this day of, 189..

STATE OF NEW YORK, }
County of, } ss.:

On this day of, 189.., before me, the subscribers personally appeared and and to me personally known to be the same persons described in and who executed the within instrument and severally acknowledged that they executed the same.

11.

..... COURT.

IN RE EXAMINATION OF "E. R. B.,"
A JUDGMENT-DEBTOR UPON AP-
PLICATION OF "W. C. S." UPON
A JUDGMENT ENTITLED
..... COURT.
W. C. S.
v.
E. R. B..

Warrant of commitment of
party refusing to give un-
dertaking. Code, § 2440.

*The People of the State of New York, to the Sheriff of the
County of, Greeting:*

WHEREAS, I, as, did, on
the day of, 189.., upon the proper affi-

davit, issue a warrant under section 2437 of the Code of Civil Procedure for the arrest of, a judgment-debtor, and whereas the said was duly arrested and brought before me, and, whereas, I did, on the day of, 189., make an order directing the said to enter into an undertaking as prescribed by section 2440 of the aforesaid Code. And it appearing to me that a copy of the said order was duly and personally served upon said at the of, on the day of, 189., at A. M., and it further appearing that the said has failed and neglected to furnish said undertaking as directed by said order.

You are hereby required to commit said, judgment-debtor, to the common jail of your county, there to remain until he gives the undertaking herein mentioned, or until finally discharged from the aforesaid warrant, and that you produce the said judgment debtor before me, or a referee appointed by me, at such times and places as I may appoint and direct., Judge.

Date the day of, 189..

12.

....., COURT.

IN THE MATTER OF THE EXAMINATION OF "E. R. B.," A JUDGMENT-DEBTOR, IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION UPON A JUDGMENT ENTITLED
....., COURT.
W. C. S.
v.
E. R. B.

Affidavit for order for examination in aid of an execution. Code, § 2442.

STATE OF NEW YORK, }
County of, } ss.:

....., being duly sworn, says he is the judgment-creditor herein

That judgment was rendered on the day of....
... , 189., in the court of

county, in an action wherein was plaintiff, and was defendant, in favor of the said against the said for the sum of \$..... upon the said judgment-debtor's appearance in the action (or upon the personal service of the summons in the action upon the judgment-debtor). As appears by the judgment-roll filed in the office of the clerk of the said county of, reference to which is hereto had, and the same is made a part of this affidavit, that the said judgment was duly docketed and the judgment-roll duly filed in the office of the clerk of..... on the day of 189... (That a transcript of said docket was on the.....day of....., 189..., duly filed and the judgment duly docketed in the office of the clerk of county).

That within five years after the original entry of said judgment, and on the day of, 189..., an execution was duly issued out of said court, it being a court of record, upon said judgment against the property of the said, judgment-debtor, and delivered to the sheriff of county, where the said judgment debtor then resided and still resides (or where the judgment-debtor has at this time an office for the regular transaction of business in person). That said execution is now in the hands of said sheriff unreturned, and that said judgment remains unpaid (or that there is still unpaid upon the said judgment the sum of \$.....)

Deponent further says that said judgment-debtor.....
.....has property not exempt from these proceedings by section 2463 of the Code of Civil Procedure, viz.:

.....
That on the.....day of.....189..., the judgment-creditor caused a demand to be made by the said sheriff upon said judgment-debtor to apply his said property to the satisfaction of said judgment (a copy of which said demand is hereto annexed and forms a part of this affidavit).

And the judgment-debtor has neglected and refused so to do.

That said.....was duly authorized to make such

demand for the judgment-creditor, and was present to receive said property or an assignment thereof.

Deponent further says that the said judgment-debtor, upon demand as aforesaid, unjustly refused and still unjustly refuses to apply his property towards the satisfaction of said judgment, as deponent is informed and believes, and that no previous application has been made herein for the order here asked for.

Sworn to before me this.....day of....., 189..

13.

.....COURT.

IN THE MATTER OF THE EXAMINATION OF "E. R. B.," A JUDGMENT-DEBTOR, IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION UPON THE APPLICATION OF..... UPON A JUDGMENT ENTITLED
..... COURT.
"W. C. S."
v.
"E. R. B."

Affidavit for order of examination in aid of execution on a judgment of inferior courts. Code, § 2441.

STATE OF NEW YORK, }
County of... , } ss.:

....., being duly sworn, says he is the
..... judgment-creditor herein.....

That judgment was duly rendered on the....day of...., 189.., in a justice's court of the.....of.....county of....., N. Y., before....., Esq., a justice of the peace of said town, in an action wherein.....was plaintiff, and.....was defendant, in favor of the said.....against the said....., for the sum of \$.....(or for a sum not less than twenty-five dollars). That said judgment was so rendered upon the personal service of the summons duly issued and signed by said justice in said action upon the judgment-debtor (or upon the personal appearance of the judgment-debtor before the said justice, in said action), and the judgment so rendered was

duly docketed by said justice on the aforesaid day, as appears by the said justice's docket, reference to which is hereto had and the same is made a part of this affidavit. That a transcript of the original docket of said judgment was on the.....day of.....189..., and within six years of the time of its said docketing, duly filed and said judgment was duly docketed in the office of the clerk of the county of.....

(That a transcript of said docket of the said clerk was afterwards and on the.....day of....., 189..., duly filed and the said judgment duly docketed in the office of the clerk of the county of.....).

That afterwards, and within five years from the time of the docketing of said judgment in the office of the clerk of the county of.....an execution upon said judgment against the property of the said judgment-debtor was duly issued by the said clerk of the county of..... out of said county court. The same being a court of record, and on the....day of....., 189..., duly delivered to the sheriff of the county of.....where the said judgment-debtor then resided and still resides (or where the said judgment-debtor now has a place for the regular transaction of business in person).

That said execution is now in the hands of said sheriff, unreturned, and that said judgment remains.....unpaid (or that there is still unpaid upon said judgment the sum of \$.....). Deponent further says, that said judgment-debtor, ..., has property not exempt from these proceedings by section 2463 of the Code of Civil Procedure, viz.:

..... That on the....day of....189..., the judgment-creditor caused a demand to be made by the said sheriff upon said judgment-creditor to apply his said property to the satisfaction of said judgment (a copy of which said demand is hereto annexed, and forms a part of this affidavit).

And the judgment-debtor has neglected and refused so to do. That said.....was duly authorized to make such demand for the judgment-creditor, and was present to receive said property or an assignment thereof.

Deponent further says that the said judgment-debtor, upon demand as aforesaid, unjustly refused and still un-

justly refuses to apply his property towards the satisfaction of said judgment as deponent is informed and believes, and that no previous application has been made herein for the order here asked for.

Sworn to before me this.....day of....., 189..

14.

.....COURT.

IN THE MATTER OF THE EXAMINATION OF "E. R. B.," A JUDGMENT-DEBTOR, IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION UPON THE APPLICATION OF..... "W. C. S.," ON A JUDGMENT ENTITLED COURT. " W. C. S." v. " E. R. B."	Order for examination in aid of execution. Code, § 2441.
---	---

It having been made to appear to me by the annexed affidavit..... That judgment was rendered on the day of....189., in the.....court of..... county in an order wherein.....was plaintiff, and was defendant, in favor of the said. against the said....., for a sum not less than twenty-five dollars, upon personal service of the summons in the action upon the judgment-debtor (or upon the appearance in the action by the judgment-debtor), and as appears by the judgment-roll therein that an execution against the property of the said judgment-debtor has been duly issued out of a court of record, to the sheriff of the proper county, upon the aforesaid judgment within five years from the time the said judgment was docketed; and that such execution has not been returned by the said sheriff, and that such judgment still remains....unpaid (or that there still remains unpaid upon said judgment the sum of..... dollars). That the said judgment-debtor has property not exempt from these proceedings by section 2463 of the Code of Civil Procedure, which he unjustly refuses to apply

towards the satisfaction of said judgment, as stated in said affidavit.

I do, therefore, hereby order that it be referred to
, Esq., counselor, of, N. Y. And
 I do hereby appoint the said a referee in
 these proceedings with all the power prescribed by section
 2444 of the Code of Civil Procedure, to examine the said
 judgment-debtor and take his answers under oath, and to
 examine on oath such witnesses as may be offered by the
 respective parties. And I do further order and require the
 said judgment-debtor, to attend and be examined
 before the said referee, at such times and places as he shall
 by his summons appoint and direct (or at in the
 of, N. Y., on the day
 of, 189.., at A. M.), concerning his prop-
 erty mentioned in the affidavit hereto annexed. And the
 said, his agents and servants, are hereby
 forbidden from making or suffering any transfer or other
 interference with the property of, or in
 which he has any interest, legal or equitable, and not ex-
 empt by section 2463 of the Code of Civil Procedure,
 until further direction in the premises.

Dated the day of, 189..

....., Judge.

15.

..... COURT.

IN RE EXAMINATION OF "E. R. B.,"
 A JUDGMENT-DEBTOR IN PROCEED-
 INGS SUPPLEMENTARY TO EXE-
 CUTION UPON A JUDGMENT EN-
 TITLED

..... COURT.
 W. C. S.
 v.
 E. R. B.

Affidavit for an alias order for
 examination as to after-ac-
 quired property.

..... County, ss.:

..... being duly sworn, says he is
, that heretofore and on the day of

...., 189..., this deponent obtained an order herein for the examination of, the judgment-debtor, which said order and the affidavit upon which it was founded are hereto annexed and form a part of this affidavit (annex a copy of the original order and affidavit). That said order was duly served upon the judgment-debtor on the day of, 189..., and said proceedings are now pending, and the judgment herein remains wholly unpaid. That after the service of said order and on or about the day of, 189..., the judgment-debtor received and became the owner of certain property, viz.:, of which he is still the owner.

That no previous application for an alias order for the examination of the judgment-debtor has been made herein.

Sworn to before me this day of, 189..
....., Judge.

16.

..... COURT.

IN RE EXAMINATION OF "E. R. B.,"
A JUDGMENT-DEBTOR IN PROCEED-
INGS SUPPLEMENTARY TO EXECU-
TION UPON A JUDGMENT ENTITLED

..... COURT.

W. C. S.

v.

E. R. B.

Alias order for examination
of party as to after-acquired
property.

It appearing to me by the affidavit of hereto annexed, that an order for the examination of the judgment-debtor herein has been hereto fore issued and that the said proceedings are now pending. That after the service of said order the judgment-debtor became the owner and possessed of certain property, viz.:

.....
That judgment was perfected and the roll thereof filed in the clerk's office of the county of on the day of, 189 , for \$.....

That the first execution upon said judgment in due form of law was duly issued to the sheriff of said last-mentioned

county, and was duly returned by him within ten years last past wholly unsatisfied, and that the said judgment remains wholly unpaid. I do, therefore, hereby order that it be referred to, Esq., counselor, of, N. Y., to take the testimony and examination in these proceedings, and I do hereby appoint the said a referee in these proceedings for the purpose aforesaid, and I do also further order and require the said judgment-debtor, to attend and be examined before the said referee, at in the, N. Y., on the day of, 189.., at .. A. M., and the said is hereby forbidden from making or suffering any transfer or other disposition of, or interference with, the property of or in which has any interest, legal or equitable, not exempt from these proceedings by section 2463 of the Code of Civil Procedure until further direction in the premises.

....., Judge.

Dated, 189..

17.

..... COURT.

IN THE MATTER OF THE EXAMINATION OF "E. R. B.," A THIRD PERSON IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION UPON THE APPLICATION OF "S. C." UPON A JUDGMENT ENTITLED.
..... COURT, ... COUNTY.
W. S. C.
v.
E. R. B.

Affidavit for order for examination of third party.
Code, § 2441.

STATE OF NEW YORK, }
County of } ss.:

..... being duly sworn, says he is the judgment-creditor hereinafter mentioned (or that he is the assignee of the judgment hereinafter described). That judgment was rendered on the day of, 189.., in the

court of county, in an action wherein was plaintiff, and was defendant, in favor of the said against the said for the sum of \$...., upon the service of the summons in the action upon the said judgment-debtor (or upon the personal appearance of the judgment-debtor in the action), the judgment-roll of which was duly filed, and the judgment duly docketed in the clerk's office of the county of, reference to which is hereto had, and the same is made a part of this affidavit. That an execution upon said judgment was duly issued out of a court of record within five years from the time of the original docket thereof, and delivered to the sheriff of the county of, where the said judgment-debtor then resided and yet resides (or where the said judgment-debtor now has a place for the transaction of business in person), (or where the judgment-roll in the action is filed). That said execution has been returned by said sheriff wholly unsatisfied, and the said judgment remains wholly unpaid (or that said execution has been returned partly unsatisfied, and there is still due upon said judgment the sum of \$....), (or that said execution is yet in the hands of the said sheriff unreturned, and there is still due upon said judgment the sum of \$....).

That the first execution issued upon said judgment was returned within ten years last past.

Deponent further says, that "E. R. B.," of the of , N. Y., has personal property of the said judgment-debtor exceeding ten-dollars in value, viz: (or he is indebted to the judgment-debtor in a sum exceeding ten dollars), and that no previous application has been made herein for an order to examine said third person.

Sworn to before me this day of, 189..

.....

18.

SUPREME COURT — COUNTY OF.....

IN THE MATTER OF THE EXAMINATION OF "E. R. B." A JUDGMENT-DEBTOR, IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION UPON A JUDGMENT ENTITLED SUPREME COURT.

W. C. S.

v.

E. R. B.

Affidavit of service of order, warrant, attachment, etc.

County of....., ss:

....., being duly sworn, says, that at the..... of....., on the....day of...., 189., he served the annexed affidavit and order upon.....by delivering to, and leaving with him personally, copies thereof, and at the same time exhibiting to him the original order and the signature of....., judge, subscribed thereto.

That deponent is over eighteen years of age and knew the person served to be the person mentioned and described in the within order and affidavit.

(Signature of affiant.)

Sworn to before me this....day of...., 189..

(Signature of officer.)

19.

..... COURT.

IN RE EXAMINATION OF "E. R. B.,"
A JUDGMENT-DEBTOR IN PROCEED-
INGS SUPPLEMENTARY TO EXECU-
TION UPON THE APPLICATION OF
"W. C. S.," UPON A JUDGMENT
ENTITLED

..... COURT.
W. C. S.
v.
E. R. B.

Order for examination of
third person. Code, § 2441.

It having been made to appear to me by the affidavit of
....., that judgment was rendered on the.... day of
...., A. D., 189., in the..... court of..... county in an
action wherein..... was plaintiff, and... .. was
defendant, in favor of the said..... against the
said....., for the sum of \$.... (or for a sum not less
than twenty-five dollars), upon personal service of the sum-
mons in the action upon him (or upon the personal appearance
of the defendant in the action). That an execution upon
said judgment was duly issued from a court of record
within five years from the entry of said judgment (or by
leave of the court), to the sheriff of the proper county, and
that such execution has been duly returned by the said
sheriff wholly unsatisfied, and the said judgment remains
wholly unpaid (or that said execution has been duly re-
turned partly unsatisfied, and there still remains due and
payable on said judgment the sum of \$....) (or that said
execution is yet in the hands of the sheriff wholly unsatis-
fied, and the said judgment remains wholly unpaid), and
that....., of the..... of....., has personal
property of the said judgment-debtor exceeding ten dollars
in value (or is indebted to the judgment-debtor in a sum ex-
ceeding ten dollars), as stated in said affidavit. I do, there-
fore, hereby appoint....., Esq., counselor of.....,
N. Y., a referee in these proceedings, with the power and

subject to the limitations prescribed in sections 2442 and 2444 of the Code of Civil Procedure.

I do also order and require the said to attend and be examined before the said referee at, in the of, N. Y., on the day of, 189.., at A. M. (I do also order and require that a copy of this order be served upon the aforesaid judgment-debtor on or before the day of, 189..), and the said judgment-debtor and the said are severally forbidden from making or suffering any transfer or other disposition of, or interference with, the property of said judgment-debtor, or in which he has any interest, legal or equitable, not exempt from these proceedings by section 2463 of the Code of Civil Procedure, or debt concerning which said is required to attend and be examined, until further direction in the premises.

Dated at this day of, 189..

....., Judge.

20.

..... COURT.

IN THE MATTER OF THE EXAMINATION OF "E. R. B.," A JUDGMENT-DEBTOR IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION UPON A JUDGMENT ENTITLED

..... COURT.

W. C. S.

v.

E. R. B.

Referee's summons for attendance of debtor.

To

I, ..., duly appointed a referee in these proceedings, under section 2442 of the Code of Civil Procedure, to examine you and witnesses as prescribed by section 2444 of said Code, by an order made by Hon. M. L. W., ... county judge, and dated the day of, 189.., and heretofore duly served upon you; do hereby summon and require you to attend in person before me at in the, N. Y., on the day of

...., 189.., at .. A. M. of said day, to be examined as in said order directed and required.

Dated this day of, 189..

....., Referee.

21.

OATH OF REFEREE, CODE, § 2445.

..... COURT.

IN THE MATTER OF THE EXAMINATION OF "E. R. B.," A JUDGMENT-DEBTOR, IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION UPON A JUDGMENT ENTITLED

....., COURT.

W. C. S.

v.

E. R. B.

STATE OF NEW YORK, } ss. :
..... County, }

..... being duly sworn, says that he will faithfully and fairly discharge his duty as referee upon the matter referred to him, and make a just and true report, according to the best of his understanding.

(Signature of referee.)

Subscribed and sworn to before me this day of, 189.

.....

SUBPCENA DUCES TECUM.

STATE OF NEW YORK, } ss. :
..... County of, }

The People of the State of New York, to
Greeting :

You are commanded that all and singular business and excuses being laid aside to be and appear in your own proper

person before.....the undersigned referee at.....
 in the.....of.....on the....day of...., 189., at....
 o'clock in the noon of that day, to be examined as
 a witness in a certain proceeding entitled
 pending undetermined, and then and there to be tried on
 the part of and that you bring with you and
 produce at the time and place aforesaid certain books,
 papers and writings, viz.: A journal and ledger kept by
 you between the day of, 189., and the day
 of, 189., also a cash book kept by you during the
 aforesaid time now in your custody or control, and all other
 deeds, evidences of debt and writings which you have in
 your custody and power concerning the premises. And for
 a neglect or refusal to obey this subpoena, you will be
 deemed guilty of a contempt of court and liable for all losses
 or damages sustained thereby by the party in whose behalf
 you are subpoenaed, besides fifty dollars in addition thereto.

Dated the day of, 189..

(Signature of referee or judge.)

(Signature of attorney.)

22.

.....COURT.

IN THE MATTER OF THE EXAMINA-
 TION OF A
 IN PROCEEDINGS SUPPLEMENTARY
 TO EXECUTION UPON A JUDGMENT
 ENTITLED.

..... COURT.

W. C. S.

v.

E. R. B.

Referee's subpoena. Code,
 § 854.

*The People of the State of New York to
 Greeting :*

I, ..., duly appointed a referee herein by an
 order made by Hon. M. L. W., a county judge,
 dated the day of....189., under section 2442 of the
 Code of Civil Procedure, do hereby command you that all

business and excuses being laid aside, you, and each of you, appear and attend before me at in the of on the....day of 189.., at A. M., to testify and give evidence in these proceedings (and that you bring with you, and then and there produce the books of containing certain entries, and all books, papers, deeds, contracts, in your possession or under your control, relating to), and for a failure to attend or produce said documents you will be deemed guilty of a contempt of court.

....., Referee.

Dated the....day of...., 189..

23.

.....COURT.

IN THE MATTER OF THE EXAMINATION OF "E. R. B.," A JUDGMENT-DEBTOR, IN SUPPLEMENTARY PROCEEDINGS UPON A JUDGMENT ENTITLED.

..... COURT.

W. C. S.

v.

E. R. B.

Deposition taken before referee or judge upon examination.

The examination of "E. R. B.", a judgment-debtor (or "E. R. B.", a third party, examined under section 2441 of the Code of Civil Procedure, or E. B. a witness produced by the judgment-creditor), under section 2435 (or 2436) taken by "G. W. B.", Esq., referee appointed under section 2442 in the on the day of 189... Said "E. R. B." being duly sworn testified.

(Here insert testimony.)

Subscribed and sworn to before me this day of, 189..

(Signed by witness.)

24.

.....COURT.

IN RE EXAMINATION OF "E. R.
B.," A JUDGMENT-DEBTOR, IN
PROCEEDINGS SUPPLEMENTARY
TO EXECUTION UPON A JUDG-
MENT ENTITLED.

.....COURT.

W. C. S.

v.

E. R. B.

Certificate of referee. Code,
§ 2442.

To the Hon.....:

The undersigned referee appointed under section 2442 of the Code of Civil Procedure in the above proceedings does hereby certify and return: That before entering upon the examination or taking testimony, I took the oath prescribed by law, which is hereto annexed and returned (or that the parties hereto duly signed a stipulation waiving the oath of the referee, which is hereto annexed and returned). That at the time and place mentioned in the order hereto annexed, viz.: at.... A. M., on the.....day of, 189..., at.....in the.....of.....N. Y., I called said proceedings, and said judgment-creditor appeared before me by, Esq., his attorney but said E. R. B., the judgment-debtor, (or E. B., the witness named in the annexed subpoena) came not, but made default, although a full hour was allowed for him to appear after the time required in and by said order (summons or subpoena); (or that said E. R. B. or G. H., a third party, or E. B., a witness, also attended before me, but refused to be sworn or to be examined, though directed thereto by me), (said judgment-debtor appeared in person and by his attorney and submitted to examination as directed by said order and made certain objections which are hereby annexed and returned). (That I issued a subpoena herein which was duly served upon and returned with proof of service; copies of said subpoena, and proof of service are hereto annexed and returned; that at

the time designated therein for the appearance of the said witness I attended at attended by for the judgment-creditor, but, the said witness, did not attend, but made default).

Said examination was held before me pursuant to said order, and the various adjournments had thereunder, on the following days, to-wit: on the . . . day of . . . 189. ., on the . . . day of . . ., 189. ., and I further certify that I took all of the testimony given, in writing, which said testimony appears in full in my minutes, which are hereto annexed, together with the exhibits put in evidence, that the various objections, etc., appear in the minutes.

All of which is respectfully submitted,
, Referee.

Dated the day of . . ., 189. .

25.

..... COURT.

IN RE EXAMINATION OF "E. R. B.,"
 A JUDGMENT-DEBTOR IN PROCEED-
 INGS SUPPLEMENTARY TO EXECU-
 TION UPON A JUDGMENT ENTITLED

..... COURT.

W. C. S.

v.

E. R. B.

Affidavit and order to show
 cause for an order that the
 judgment-debtor or third
 party deliver property to the
 sheriff. Code, § 2447.

.....County, ss:

.....being duly sworn, says he is, that on or about the . . . day of . . ., 189. ., an order for the examination of, the judgment-debtor herein, and the affidavit upon which it was founded, was duly served upon the judgment-debtor herein, reference to which is hereto had, and the same is made a part of this affidavit. That the examination, in said proceedings, was duly taken before, Esq., a referee duly appointed in said proceedings, and the testimony before said referee was duly certified to Hon, who granted the order of examination herein, reference to which certificate is hereto had and the same is made a part of this affidavit.

That it appears by said examination and testimony that has, in his possession or under his control, money, or other personal property, belonging to him which should be applied to the payment of the judgment herein (or that *one or more* articles of *personal* property, capable of delivery, the property of the judgment-debtor, whose right to the possession thereof is not substantially disputed, are in the possession or under the control of:). That no previous application for an order to show cause why the judgment-creditor should not have an order under section 2447 of the Code of Civil Procedure, has been made herein.

Sworn to before me on this....day of...., 189..

(Signature of affiant.)

Upon the annexed affidavit and all the pleadings and proceedings in this matter, let.....show cause before me at....., on the....day of....., 189., at....A. M. of said day, why....., the judgment-creditor herein, should not have an order that.....deliver to....., sheriff of.....(or....., receiver herein), certain money and personal property mentioned and described in the testimony taken in these proceedings, viz.....

Let this order and the annexed affidavit be served upon on or before....A. M. of the....day of....., 189., and such service shall be deemed sufficient.

....., Judge.

Dated, 189..

26.

..... COURT.

IN THE MATTER OF THE EXAMINATION OF "E. R. B.," A JUDGMENT-DEBTOR IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION UPON THE APPLICATION OF "W. C. S.," THE JUDGMENT-CREDITOR.

Order for delivery of property to sheriff. Code, § 2447.

An order to show cause why the judgment-creditor herein should not have an order that deliver to

....., sheriff (or receiver), certain property, viz:
, to be applied to the payment of the judgment
 herein, having been heretofore issued returnable at this
 time and place, and said order having been duly served
 and returned.

Now upon reading and filing the affidavit of
 verified on the day of, 189..., the order to show
 cause, with proof of service (the certificate of the referee
 and the testimony taken herein), and after hearing
 of counsel for the judgment-creditor, and
 of counsel for *Ordered*, That
 pay to, sheriff of (or receiver herein),
 and deliver to said sheriff (assign, convey and
 deliver to said sheriff). And it appearing to
 my satisfaction that an order appointing a receiver herein
 is not necessary, it is further ordered that said sheriff apply
 said property as prescribed by sections 2448, 2449, 2450, of
 the Code of Civil Procedure. It is further ordered that the
 judgment-creditor be and he is hereby allowed \$.... costs
 of these proceedings together with his disbursements, which
 are hereby taxed at the sum of \$...., making in the aggre-
 gate the sum of dollars.

....., Judge.

Dated, 189..

27.

..... COURT.

IN RE EXAMINATION OF "E. R. B.,"
 A JUDGMENT-DEBTOR IN PROCEED-
 INGS SUPPLEMENTARY TO EXE-
 CUTION UPON A JUDGMENT EN-
 TITLED

..... COURT.

W. C. S.

v.

E. R. B.

Affidavit and order to show
 cause for leave to discon-
 tinue. Code, § 2454.

..... County, ss.:

....., being duly sworn, says he is
 herein. That these proceedings were commenced on

or about, 189.., that subsequent to the commencement of these proceedings, and on or about the day of, 189.., the judgment-debtor was duly discharged from his debts, under the "two-thirds act," Code Civ. Pro., art. 1, tit. 1, chap. 17, as appears by an order in said proceedings filed in the office of the clerk of the county of, reference to which is hereto had, and the same is made a part of this affidavit. (That after these proceedings were commenced the judgment-creditor's claim was duly paid).

Sworn to before me this day of, 189..

(Signature of affiant.)

Upon the annexed affidavit and all the pleadings and proceedings in this matter, let show cause before me at my chambers, in the of, on the day of, 189.., at, A. M., why the judgment-creditor should not have an order :

I. Discontinuing his proceedings herein.

II. Forsuch other, further or different relief herein as to the court may seem meet.

Let this order be personally served upon on or before 6 P. M., of the day of, 189.., and such service shall be deemed sufficient.

Dated, 189..

., Judge.

28.

. COURT.

IN RE EXAMINATION of "E. R. B.,"
A JUDGMENT-DEBTOR IN PROCEED-
INGS SUPPLEMENTARY TO EXECU-
TION UPON A JUDGMENT ENTITLED
. COURT.
W. C. S.
v.
E. R. B.

Order of discontinuance of
the proceedings.

An order to show cause why the judgment-creditor should not have an order discontinuing these proceedings,

having been duly made and served herein, returnable at this time and place; now upon filing the affidavit of
, verified on the day of, 189.., the order to show cause, with proof of service thereof, and after hearing, of counsel for the judgment-creditor, and, of counsel for,
Ordered, That these proceedings be, and the same are, hereby discontinued (or that the is hereby allowed to discontinue these proceedings upon the following terms:

 (or that the said may, upon paying the said \$.... costs, etc., enter an order discontinuing the said proceedings),

....., Judge.

Dated...., 189..

29.

..... COURT.

IN THE MATTER OF THE EXAMINATION OF "E. R. B.," A JUDGMENT-DEBTOR, IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION UPON A JUDGMENT ENTITLED

..... COURT.

W. C. S.

v.

E. R. B.

Affidavit and notice of motion for order vacating proceedings.

.....County, ss :

....., being duly sworn, says he is the judgment-debtor above named. That the affidavit and order in these proceedings were served upon deponent on the day of, 189.., copies of which are hereto annexed, and form a part of this affidavit (or that the affidavit and order were not served upon deponent as required by section 2452 of the Code of Civil Procedure in that.....)

(That after these proceedings were commenced the judgment debtor was arrested, and is now held on an execution against his person).

Sworn to before me this day of, 189..

.....

Take notice, that upon the above and annexed affidavit, and all the pleadings and proceedings in this matter, the undersigned will move before, at his chambers in, on the day of, 189.., at A. M., for a rule or order :

I. Vacating the order for on the following grounds.....

II. For such other, further or different relief as to the court may seem meet, with costs of this motion.

Yours, etc.,

.....
Attorney for judgment-debtor.

....., N. Y.

To

30.

.....COURT.

IN RE EXAMINATION OF " E. R. B.,"
A JUDGMENT-DEBTOR, IN PRO-
CEEDINGS SUPPLEMENTARY TO
EXECUTION UPON A JUDGMENT
ENTITLED.

.....COURT.
W. C. S.
v.
E. R. B.

} Order vacating proceedings.

On reading and filing the affidavit of verified on the....day of, 189.., notice of motion with proof of service thereof, and after hearing.....of counsel for the judgment-debtor, and.....of counsel for the judgment-creditor,

Ordered, That the proceedings herein be, and the same are hereby vacated and set aside, (that the motion herein be, and the same is hereby denied, with ten dollars costs.)

Dated the....day of, 189..

....., Judge.

31.

.....COURT.

IN RE EXAMINATION OF "E. R. B.,"
A JUDGMENT-DEBTOR, IN PRO-
CEEDINGS SUPPLEMENTARY TO
EXECUTION, UPON THE APPLICA-
TION OF "W. C. S."

Affidavit for order dismissing
proceedings. Code, § 2454.

.....County, ss:

....., being duly sworn, says he is.....,
that these proceedings were commenced on the....day of
....., 189..., that deponent has at divers times brought these
proceedings to a hearing, and made reasonable efforts to
consummate the same. That on the....day of....., 189...,
deponent brought this matter to a hearing before.....,
the referee herein, and was then ready to proceed in the
matter, and the judgment-creditor neglected and refused to
proceed That afterwards and on the....day of
....., 189..., deponent again moved these proceedings before
the said referee and endeavored to have the proceedings con-
summated, but the judgment-creditor again neglected and
refused to proceed. That deponent has paid out and ex-
pended in those proceedings the sum of \$....for witnesses'
fees and counsel.

Sworn to before me this....day of....., 189..

.....

(Title of cause.)

Take notice, that upon the annexed affidavit, and all the
pleadings and proceedings in this matter, the undersigned
will move, before the Hon....., at his chambers in
the....., city of....., on the....day of....., 189...,
at....., A. M., for a rule or order :

I. Dismissing the proceedings in this matter, on the
ground that the judgment-creditor unreasonably neglects
and delays to proceed in the proceedings.

II. For such other, further or different relief as to the court may seem meet, with costs.

Yours, etc.,

.....

Attorney for judgment-debtor.

32.

.....COURT.

IN RE EXAMINATION OF "E. R. B.,"
A JUDGMENT-DEBTOR, IN PRO-
CEEDINGS SUPPLEMENTARY TO
EXECUTION UPON A JUDGMENT
ENTITLED

..... COURT.

W. C. S.

v.

E. R. B.

Order dismissing proceedings
under Code, § 2454.

On reading and filing the affidavit of....., verified on the day of....., 189., notice of motion with proof of service thereof, and after hearing....., of counsel for the judgment-debtor, and....., of counsel for the judgment-creditor, *Ordered*, That the motion be, and the same is hereby granted, with \$...... costs and disbursements, which are hereby taxed at the sum of \$..., amounting in the aggregate to the sum of \$....., which said sum is to be deducted from the judgment herein (that the motion herein be and the same is hereby denied, with ten dollars costs).

....., Judge.

Dated this....day of...., 189..

33.

..... COURT.

IN RE EXAMINATION OF "E. R. B.,"
A JUDGMENT-DEBTOR, IN PRO-
CEEDINGS SUPPLEMENTARY TO
EXECUTION UPON A JUDGMENT
ENTITLED

..... COURT.

W. C. S.

v.

E. R. B.

Affidavit and notice of motion
for an order for costs to judg-
ment-creditor. Code, § 2455.

..... County, ss.:

..... being duly sworn, says that heretofore and on the day of, 189., an affidavit and order in these proceedings for the examination of, the judgment-debtor (or for the examination of A. B., a person indebted to the judgment-debtor as prescribed by section 2441 of the Code of Civil Procedure), were duly served upon the said, copies of which are hereto annexed and forms a part hereof.

That such proceedings were thereon had, that on the day of, 189., the referee appointed to take the examination herein, made and certified his said proceedings to Hon., the judge who granted the said order of examination, which said certificate is hereto annexed and forms a part of this affidavit. That the judgment-creditor paid out and expended certain sums of money in said proceeding, the items of which appear in a schedule hereto annexed, which forms a part of this affidavit.

Sworn to before me this day of 189..

.....

(Title of cause.)

Take notice that upon the annexed affidavit and all the testimony and proceedings in this matter, the undersigned will move before Hon. at his chambers in the of on the day of 189., at A. M. of said day for a rule or order :

I. That the judgment-creditor be allowed costs and the payment of his disbursements in these proceedings.

II. For such other, further or different relief herein as to the court may seem meet.

Yours, etc.,

.....

Attorney for the judgment-creditor.

....., N. Y.

To

34.

.....COURT.

IN RE EXAMINATION OF "E. R. B.,"
A JUDGMENT-CREDITOR (OR "A.
B.," A THIRD PERSON), IN PRO-
CEEDINGS SUPPLEMENTARY TO
EXECUTION UPON A JUDGMENT
ENTITLED

..... COURT.
W. C. S.
v.
E. R. B.

Order allowing costs to judg-
ment-creditor. Code, § 2455.

Upon reading and filing the affidavit of veri-
fied on the day of 189., notice of motion,
affidavit of service of affidavit and notice of motion
verified, 189., (certificate of referee) and after
hearing of counsel for, the judg-
ment-creditor in favor of said motion; and of
counsel for the judgment-debtor in opposition.

Ordered, That....., the judgment-creditor be
and he is hereby allowed \$.... costs of these proceedings,
together with his disbursements which are hereby taxed at
the sum of \$...., making in the aggregate the sum of
\$....

It is further ordered that said sum of \$.... be paid out of
any money which has come to the hands of the receiver
herein or of the sheriff (or that, the judgment-
debtor (or A. B., the said person proceeded against), pay

said sum to the said judgment-creditor within ten days after the personal service of this order upon him.)

....., Judge.

Dated, 189..

35.

.....COURT.

IN RE EXAMINATION OF "E. R. B.,"
A JUDGMENT-DEBTOR (OR "A.
B.," A THIRD PERSON), IN PRO-
CEEDINGS SUPPLEMENTARY TO
EXECUTION UPON A JUDGMENT
ENTITLED

.....COURT.

W. C. S.

v.

E. R. B.

Affidavit and notice of mo-
tion for order for costs
against the judgment-
creditor. Code, § 2456.

..... County, ss.:

....., being duly sworn, says he is the
in these proceedings; that on or about the day of
189., an affidavit and order for examination of deponent
under section 2435 of the Code were duly served upon
deponent, copies of which are hereto annexed, and form a
part of this affidavit.

That was duly examined upon said order.
That such proceedings were thereon had, that afterwards
and on or about the day of 189., such examina-
tion was finished (as appears by the certificate of the
referee, a copy of which is hereto annexed, and forms a
part of this affidavit). That no property applicable to the
payment of the judgment herein has been discovered in the
course of these special proceedings.

Sworn to before me this day of, 189..

(Title of cause.)

Take notice that upon the annexed affidavit, and all the
pleadings and proceedings in this matter, the undersigned

will move before Hon., at his chambers in the city of, on the....day of....., 189., at A. M., for a rule or order:

I. That the judgment-debtor be allowed his disbursements in these proceedings together with costs.

II. For such other, further or different relief as to the court may seem meet, with costs of this motion.

Yours, etc.,

Dated, 189..

.....
Attorney for
....., N. Y.

To

36.

.....COURT.

IN RE EXAMINATION OF "E. R. B.,"
A JUDGMENT-DEBTOR (OR "A.
B.," A THIRD PERSON), IN PRO-
CEEDINGS SUPPLEMENTARY TO
EXECUTION UPON A JUDGMENT
ENTITLED

.....COURT.

W. C. S.

v.

E. R. B.

Order allowing costs against
the judgment - creditor.
Code, § 2456.

Upon reading and filing the affidavit of, verified on the....day of, 189., the notice of motion herein, the depositions taken upon the examination herein (the certificate of, a referee appointed to take the examination herein), and after hearing, of counsel for, the judgment-debtor (or, the third party, examined under section 2441 of the Code of Civil Procedure).

Ordered, That the judgment-debtor (or, said third person), be, and he is, hereby allowed \$.... costs, together with the disbursements of these proceedings, which said disbursements are hereby taxed at \$...., making in the aggregate the sum of \$....

It is further ordered that said sum of \$...., together with \$10, the costs of this motion, is to be deducted from the judgment of the judgment-creditor herein (or that said sum of \$.... be paid to said, the third party examined in these proceedings, out of any money which has come, or may come, to the hands of the receiver, or of the sheriff in these proceedings).

....., Judge.

Dated, 189..

37.

.....COURT.

IN RE EXAMINATION OF "E. R. B.,"
A THIRD PERSON (OR "E. R. B.,"
A JUDGMENT DEBTOR), IN PRO-
CEEDINGS SUPPLEMENTARY TO
EXECUTION.

Order for payment of money
or costs. Code, § 2447.

It appearing to me from the testimony taken in these proceedings that....., the judgment-debtor, has in his possession or under his control, money belonging to him, and not exempt from these proceedings under section 2463 of the Code of Civil Procedure, his rights to which are not substantially disputed (or it appearing to me by the testimony of....., the judgment-creditor), that the costs and expenses of the judgment-creditor in these proceedings amount to the sum of \$...., and that the same have been duly taxed by me, at said sum; and it further appearing that, the said....., after the service of the order of injunction in these proceedings upon him, transferred.....property of the judgment-debtor of the value of \$...., not exempt from these proceedings by section 2463 of the Code of Civil Procedure, it is

Ordered and adjudged and I hereby order and adjudge that by the said acts of the said....., the rights and remedies of.....in these proceedings have been impaired, impeded and prejudiced. It is further ordered that pay the said.....the said sum of \$....,

as taxed and fixed by this order, within....days from the personal service of this order upon him. (It is, therefore, *Ordered*, that said.....pay the said money to....., sheriff of.....[or to....., receiver in these proceedings].)

....., Judge.

Dated....., 189..

38.

AFFIDAVITS OF SERVICE OF ORDER AND DEMAND OF PAYMENT OR DELIVERY OF PROPERTY. CODE, § 2268.

.....COURT.

(Title of matter.)

.....County, ss:

....., being duly sworn, says he is....., that at....., on the....day of...., 189., he served the annexed order and demand upon....., the....., by delivering to and leaving with him personally copies thereof, and at the same time deponent exhibited to the said.....the original order, with the signature of the judge by whom it was subscribed, and the original demand with the signature of....., by whom it was subscribed. That deponent remained with said.....for for the purpose of receiving the property mentioned in said order and demand, and that deponent was authorized to accept the said property as appears by the said written demand.

Deponent further says that said.....then neglected and refused, and has since neglected and refused to comply with said order and demand.

(Signature of affiant.)

Sworn to before me this....day of...., 189..

.....

(Annex order and demand.)

39.

AFFIDAVIT FOR AN ORDER TO SHOW CAUSE WHY PARTY
SHOULD NOT BE PUNISHED FOR NEGLECTING TO APPEAR.
CODE, § 2269.

.....COURT.

(Title of matter.)

.....County, ss.:

.....being duly sworn says he is.....,
that on the....day of....189., an order was duly issued
by Hon....., county judge, of....., in a proceeding en-
titled, In the matter of the examination of "E. R. B." a
judgment-debtor in proceedings supplementary to execu-
tion, which said order, together with the affidavit upon
which it was founded, was duly served upon "E. R. B.,"
the said judgment-debtor on the....day of...., 189., as
appears by the affidavit of.....attached to the said
affidavit and order, copies of which said affidavit and order
are hereto annexed and form a part of this affidavit. X That
at the time and place mentioned in said order the judgment-
creditor therein mentioned duly appeared before said
referee (by....., his attorney), ready to proceed
with the examination of the judgment-debtor. That.....,
the said judgment-debtor, did not appear before the said
referee at the time and place mentioned in said order (or at
any other time and place).

That deponent (the judgment-creditor) paid out for the
attendance of, his counsel in preparing the
papers in said proceedings and for attending before said
referee, the sum of \$...., deponent also paid.....,
the said referee, \$...., his fees for attending said proceed-
ings. (That subsequent to the service of said order upon
....., the said judgment-debtor, he transferred and
disposed of of the value of \$...., which he
owned and was in possession of at the time of the service
of said order, and which was not exempt from these pro-
ceedings by section 2463 of the Code of Civil Procedure.

That before the said referee entered upon the said examination he duly took the oath prescribed by section 2445 of the Code of Civil Procedure, a copy of which is hereto annexed and forms a part of this affidavit. That upon said examination, the judgment-debtor was duly sworn by the said referee and the following questions were duly propounded to the said witness. "Did you, on or about the day of ... , 189., transfer to?" "Have you, since the order in this proceeding was served upon you, executed and delivered a mortgage on to ? which said questions the said judgment-debtor refused to answer, although duly directed so to do by the said referee, as appears by the certificate of the said referee hereto annexed and which forms a part of this affidavit.

Sworn to before me this day of, 189..

(Signature of affiant.)

(Title to cause.)

Upon the annexed affidavit, and upon all the proceedings in this matter, let the judgment-debtor (or A. B.) show cause before me (or at a term of this court set down to be held at the court house in on the day of, 189., at A. M.) at my chambers in the city of on the day of, 189., at A. M., why should not have a rule or order :

I. That be punished for contempt in

II. For such other, further or different relief, as to the court may seem meet, with costs of this motion.

Let this order and the annexed affidavits be served upon the said personally on or before P. M. of the day of, 189., and such service shall be deemed sufficient.

....., Judge.

Dated, 189..

40.

ORDER FOR COMMITMENT UNDER CODE, § 2267.

..... COURT.

(Title of matter.)

WHEREAS, I as judge did, on the day of, 189., upon the proper affidavit, make an order in the above proceeding upon a judgment in the court wherein was plaintiff, and was defendant, whereby it was ordered that the judgment-debtor appear before me and be examined concerning his property on the day of, 189., at A. M. And whereas it appears to me by the affidavit of verified, 189., that a copy of the order and the affidavit on which it was founded was duly and personally served upon said as required by section 2452 of the Code of Civil Procedure, and whereas the said duly appeared before me at the time and place mentioned in said order, and whereas the said after such appearance, refused to be sworn or to take the oath required by law although directed to do so by me.

That, the said judgment-creditor, duly attended before me at said time by, his attorney, and duly moved said examination. And whereas it appears to me by the affidavit of verified on the day of, 189., that the said judgment-creditor paid out \$.... to, his said attorney, for services upon examination, and \$.... to the sheriff for his fees in these proceedings.

It is therefore ordered and adjudged that by such neglect and refusal of the said to be sworn as aforesaid, a right or remedy of ... the judgment-creditor herein may be and was impaired, impeded or prejudiced. It is further ordered and adjudged that the costs and expenses of the said judgment-creditor be and the same is hereby

taxed at the sum of \$.... It is further ordered that the said pay the said the said sum of \$...., and that he be committed to the common jail of the county until he pays such sum of money, and appears and submits to an examination as required by the order for examination herein.

....., Judge.

Dated, 189..

41.

ORDER FOR WARRANT OF ATTACHMENT. CODE, § 2268.

(Title of matter.)

It appearing to me by the affidavit of., verified on the....day of...., 189.., that the order and written demand annexed to said affidavit were duly served on, on the....day of....189.., and that..... has refused and neglected to pay the sum of money therein ordered to be paid or any part thereof, it is, therefore, ordered that a warrant be issued herein, under section 2268 of the Code of Civil Procedure, directed to the sheriff of the county of....., commanding him to take the body of the said....., if he shall be found in his bailiwick, and commit him to the common jail of....., and to detain him therein until he shall pay the said sum of \$...., or until discharged by an order of this court, or until the expiration of six months from the time he is taken into his custody on said warrant.

....., Judge.

Dated....., 189..

42.

WARRANT OF ATTACHMENT. CODE, § 2268.

.....COURT.

(Title of matter.)

*The People of the State of New York, to the Sheriff of the
county of....., Greeting:*

WHEREAS, I, ..., as....., did on the...day
of...., 189.., upon the proper affidavit, make an order in
the above-entitled proceedings, whereby it was ordered and
adjudged that.....had....., and that his said acts
had impaired, impeded and prejudiced the rights and reme-
dies of....., the judgment-creditor herein, and whereas,
the amount of the said judgment-creditor's costs and ex-
penses, and the amount of the fine imposed, were duly
taxed and fixed upon proper proof,

Now, therefore, we command you to take the body of the
said.....and commit him to the common jail of your
county, and keep and detain him therein, until he shall pay
the said sum of....dollars so ordered to be paid.

(Signature of judge.)

Dated....., 189..

.....,
Attorney for the judgment-creditor,
....., N. Y.

43.

WARRANT OF COMMITMENT.

*The People of the State of New York, to the Sheriff of
..... county, Greeting:*

WHEREAS, On the....day of....., 189.., by a certain
order made by me, In re examination of "E. R. B.," a
judgment-debtor in proceedings supplementary to execu-

tion upon a judgment entitled, ... court, "W. C. S." v. "E. R. B.," it was ordered that the said "E. R. B." pay to the said "W. C. S." (or "G. W. B.," his attorney), the sum of dollars, the costs and disbursements allowed in the supplementary proceedings. And that the said "E. R. B." be committed to the common jail of the county of until he pay said sum, and until he appear and be examined before me as directed in the original order of examination herein, and whereas the said order of, 189..., is made a part of this commitment, and a copy thereof is hereto attached.

Now, therefore, we command you to take the body of the said "E. R. B." if he shall be found in your bailiwick and commit him to the common jail of the county of, and akeep and detain him therein under your custody until he shall pay the said sum of dollars so ordered to be paid, and until he appears before me and submits to an examination as required by the order of examination herein, or until some further order in the premises, not to exceed six months.

Given under my hand this day of, 189...

....., Judge.

44.

ATTACHMENT, WARRANT OF. CODE, §§ 2269, 2273.

..... COURT.

THE PEOPLE EX REL. W. C. S. v. E. R. B.
--

The People of the State of New York, to the Sheriff of the County of, Greeting:

WHEREAS, I as did on the day of, 189..., upon the proper affidavit, make an order

in a certain proceeding entitled "In re examination of 'E. R. B.,' a judgment-debtor (or 'A. B.,' a third person), in proceedings supplementary to execution upon a judgment entitled, ... court, 'W. C. S.' v. 'E. R. B.," whereby it was ordered that it be referred to Esq., to examine, as prescribed by sections 2435 and 2442 of the Code of Civil Procedure, and whereby it was also further ordered and directed that the said appear before the said referee at where he then resided and still resides, on the day of, 189., at, A. M., and submit to an examination as therein directed, and whereas, it appears to me by the affidavit of verified on the day of, 189., that the said order and the said affidavit upon which it was issued was duly served upon the said as required by section 2452 of the Code of Civil Procedure, and it further appears to me by the affidavit of that, the referee, attended at the time and place mentioned in said order and called the said matter and there remained for one hour, prepared to take such examination, and that, attorney for, duly attended before said at the said time and place mentioned in the said order to examine the said and that during that time said failed to appear before the said referee at the place where he was by said order directed to appear.

Now, therefore, we command you to attach and bring him before me at my chambers, in the of on the day of, 189 , to answer for his alleged misconduct in not obeying said order.

We further command you, that at the time you arrest the said, that you deliver to and leave with him personally copies of this warrant and the affidavit upon which it was issued.

(Signature of judge.)

Dated, 189.

(Name and address of attorney for judgment-creditor.)

45.**INDORSEMENT UNDER SECTION 2277 OF THE CODE.**

Let _____, the _____, give security for his appearance by an undertaking as prescribed by section 2277 of the Code of Civil Procedure, in the penalty of dollars.

Dated _____, 189... _____, Judge.

46.

..... COURT.

THE PEOPLE EX REL.
W. C. S.
v.
E. R. B.

Attachment, indorsement,
etc., under Code, §§ 2269,
2273, 2275.

The People of the State of New York to the Sheriff of the County of Greeting:

We command you that you attach "E. R. B." so as to have his body before our court, at a term thereof set down to be held at the court house in the city of on the day of, 189..., at A. M., there to answer unto us as to his alleged contempt in refusing to obey the order of Hon. in the matter of the examination of "E. R. B.," a judgment-debtor, in proceedings supplementary to execution, and such other matters as shall then and there be brought against him.

Let copies of this warrant, the order directing this warrant to issue, and the affidavits upon which said order was founded, be served upon the said at the time of his arrest.

Witness Hon., one of the justices of our
said court, at, the day of, 189..

....., Clerk.

.....

Attorney for relator.

....., N. Y.

47.

(Indorsement.)

Issued by order of the court.

Let the said give an undertaking as re-
quired by section 2277 of the Code of Civil Procedure, in
the sum of dollars. If the said gives
said undertaking the sheriff may discharge him.

....., Clerk.

48.

(Return of sheriff.)

I have attached "E. R. B." and discharged him upon his
giving the undertaking prescribed by the indorsement upon
the within warrant, which said undertaking is herewith
returned.

....., Sheriff.

Dated, 189..

By virtue of the within warrant of attachment I have
arrested, and for want of undertaking have
him before the court.

....., Sheriff.

Dated, 189..

49.

.....COURT.

THE PEOPLE EX. REL.
W. C. S.
v.
E. R. B.

Undertaking by party arrested
on attachment. Code,
§ 2277.

Know all men by these presents : The we, ...,
of the of principal, and of the
..... of manufacturer, and of the....
.... of merchant, are held and firmly bound unto the
people of the state of New York in the penal sum of \$.....,
for which payment well and truly to be made we bind our-
selves jointly and severally, and our heirs, and each of our
heirs and representatives firmly by these presents. Sealed
with our seals, and dated the day of, 189..

WHEREAS, The above-named "E. R. B." has been arrested
upon a warrant of attachment issued by Hon.
(or out of the court) in a proceeding for contempt
for disobedience to an order made in the matter of the
examination of "E. R. B.," a judgment-debtor, in proceed-
ings supplementary to execution upon a judgment entitled
..... court, "W. C. S." v. "E. R. B.," and whereas the
..... issuing said attachment by an indorsement
thereon fixed a sum in which the accused might give an
undertaking for his appearance to answer, as prescribed by
section 2275 of the Code of Civil Procedure. Now, there-
fore, the condition of this obligation is such that if the
above bounden "E. R. B." will appear at the time when,
and the place where, the said warrant is returnable, viz. :
.....
and then and there abide the direction of the court (or
judge), then this obligation to be void, otherwise to remain
in full force and virtue.

Sealed and delivered in the presence of

[L. S.]

[L. S.]

[L. S.]

STATE OF NEW YORK, }
 County } ss. :

On this day of, 189..., personally appeared before me and and personally known to me to be the persons who executed the above undertaking, and severally acknowledged that they executed the same for the purpose therein mentioned.

(Signature of officer.)

(Add affidavit of justification.)

50.

.....COURT.

THE PEOPLE EX REL.

W. C. S.

v.

E. R. B.

} Warrant of commitment by
 judge upon attachment.

*The People of the State of New York, to the Sheriff of
 County, Greeting :*

WHEREAS, A judgment was duly recovered on the day of, 189..., in an action wherein was plaintiff, and was defendant, in favor of the said against the said for \$.... ; and whereas, I did on the day of, 189..., duly grant an order upon a proper affidavit for the examination of on said judgment in proceedings supplementary to execution, and whereas, said order and affidavit were duly served upon the said and whereas a warrant of attachment was thereafter issued by me and directed to the sheriff of the county of, commanding him to arrest the said, and whereas, the said has been duly arrested on said attachment, and has appeared before me ; and interrogatories have been duly filed and answered and affidavits and proofs in said matter have been duly filed and considered, and after hearing "J. A. J." of counsel for the

plaintiff, and "J. D. H." of counsel for the said
, it is ordered and adjudged, and I do hereby order and
 adjudge that the said.....is guilty of the contempt
 charged against him, and that such misconduct was cal-
 culated to and did defeat, impair, impede or prejudice the
 rights and remedies of the said plaintiff.

And whereas, the plaintiff's costs and expenses have been
 found to be, and taxed by me at the sum of \$...., and it
 also having been found by me on competent proof that the
 plaintiff has been injured by the said misconduct of the
 said in the further sum of \$...., making in
 the aggregate the sum of \$....

Now, therefore, you are hereby commanded that you take
 the body of the said and him closely keep in
 your custody in the common jail of your county for the
 period of six months or until he shall have paid the sum of
 \$.... to the plaintiff herein ; or until the said
 shall be discharged by the further order in the premises.

....., Judge.

Dated, 189..

J. A. J., attorney for plaintiff,
, N. Y.

51.

ANSWER OF DEFENDANT IN CONTEMPT PROCEEDINGS.

(Title of cause same as above.)

The defendant in the above-named proceedings answers
 the plaintiff's affidavit and petition upon which the attach-
 ment herein was issued as follows :

I. That the judgment upon which the order for non-com-
 pliance with which this attachment was issued was fully
 paid prior to the application for said order.

II. That the order for non-compliance, with which this
 attachment was issued, was not served upon the defendant
 as required by the practice of this court.

III. That the first execution issued upon the judgment, upon which the supplementary proceedings were founded, was not returned within ten years from the time of granting the order therein, and the judge never obtained jurisdiction.

IV. That the execution, upon which the supplementary proceedings were founded, was not issued within the time allowed by the Code of Civil Procedure, and the court never obtained jurisdiction of the subject matter or the person of the defendant.

V. That the order in proceedings supplementary to execution, for the examination of defendant, was not granted by a judge of the county to which the execution was issued, and the judgment-debtor did not reside at the time of making the order in the county to which the execution was issued, and therefore the judge never had jurisdiction to issue the same.

Wherefore, the defendant asks that said writ of attachment be dismissed with costs.

“E. R. B.”

..... County, ss.

....., being duly sworn, says that he is the above-named defendant, that he has read the foregoing answer, and that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

“E. R. B.”

Sworn to before me this day of, 189.

.....

52.

ORDER FOR INTERROGATORIES UNDER CODE, § 2280.

(Title of cause.)

A warrant of attachment having heretofore issued against the defendant “E. R. B.,” and the defendant being now in

attendance under said attachment, and the defendant having duly filed his answer denying the alleged contempt.

Now, on motion of, it is ordered that the plaintiff do, within days, file in the county clerk's office, and serve upon the defendant, interrogatories touching the alleged contempt, and that the said defendant make and file his answer on oath to such interrogatories in said clerk's office, and serve a copy thereof upon within days thereafter. And either party may produce affidavits or other proofs contradicting or corroborating any answers (or it is further ordered that it be referred to "G. H. G.," Esq., of, to examine the said defendant on oath upon said interrogatories, and to take such further proof as either party may produce before him in relation to the misconduct alleged, and that he report the facts and testimony to me).

It is further ordered that the sheriff detain the said defendant in his custody and produce him before the said referee from time to time as the said referee may direct, and produce him before me on the coming in of the said referee's report therein.

., Judge.

53.

INTERROGATORIES UNDER SECTION 2280, CODE OF CIVIL PROCEDURE.

(Title of cause.)

Interrogatories to be administered to "E. R. B.," the above-named defendant, touching a contempt alleged against him for the disobedience of an order made in the matter of the examination of "E. R. B." in proceedings supplementary to execution, upon a judgment entitled court, "W. C. S." v. "E. R. B." for (state what the contempt consists of).

First interrogatory.—Were you heretofore and on or about the day of 189., served with an order, a copy of which is hereto annexed, marked "A." If yea, produce the copy order left with you.

Second.—If to the last interrogatory you answer yea, then state whether or not the said at the time he served the said order upon you, delivered to and left with you, a paper writing, a copy of which is hereto annexed marked “B.”

If you answer that such paper was left with you, then produce the same attached to your answer herein.

Third.—Did you, at the time the said demand was served upon you, refuse to pay the money (or deliver the property) mentioned in said written demand?

“J. A. J.,”

Attorney for the plaintiff.

....., N. Y.

54.

ANSWER TO INTERROGATORIES UNDER CODE, § 2280.

(Title of cause.)

The defendant answers the plaintiff's interrogatories in these proceedings as follows :

To the first interrogatory this defendant saith
(insert the defendant's answers).

To the second interrogatory the defendant saith, ...
(Jurat.)

(Signature of “E. R. B.”)

55.

ORDER ON HEARING AFTER RETURN OF INTERROGATORIES.

(Title of cause.)

An order of attachment having been heretofore issued herein against the body of....., and he, having been arrested thereon, and interrogatories having been duly filed

by the plaintiff, and answers thereto by the defendant, and it having been duly referred to....., Esq., to examine the said.....and take such further proofs as either party might produce before him in relation to said alleged contempt, and the said referee having made his report,

Now, on reading and filing the said order of attachment, the interrogatories and answers thereto, the report of the said referee, and after hearing....., of counsel for plaintiff in favor of....., and....., of counsel for....., it is ordered and adjudged (that the attachment issued in that case be, and the same is, hereby discharged) that.....is guilty of the contempt charged against him, and that such acts and misconduct were calculated to and did actually defeat, impair, impede or prejudice the rights and remedies of the plaintiff above named.

It is further ordered and adjudged that the costs and all expenses of the plaintiff amount to, and are hereby taxed at the sum of \$....

It is further adjudged that the plaintiff's actual loss or injury produced by the said misconduct of the defendant is \$....

It is therefore further ordered that a fine of \$.... be, and the same is hereby imposed upon the said.....for his misconduct, to be paid by him to the said plaintiff to indemnify the latter for his loss or injury.

It is further ordered and adjudged that the said.....stand committed to the common jail of the county of.....until the said fine is paid, unless sooner discharged; and that a warrant issue to carry this order into effect.

....., Judge.

56.

ORDER OF COURT THAT AN ATTACHMENT ISSUE.

At a special term of the supreme court held at
the city of.....in and for the county of
.....on the....day of...., 189..,

PRESENT—Hon.,
Justice.

(Title of cause.)

On reading and filing the affidavit of....., verified on the....day of....189.., the order to show cause herein, the affidavit of....., verified on the....day of....., 189.., showing the personal service on....., on the ...day of..., 189.., of the order thereto annexed, made by Hon..... in the matter of the examination of "E. R. B.," a judgment-debtor in proceedings supplementary to execution upon a judgment entitled.....court, "W. C. S. v. E. R. B.," requiring the said "E. R. B." to deliver certain personal property therein specified to....., sheriff of.....(or to....., receiver in said proceedings), and showing a demand of said "E. R. B." on the....day of....., 189.., and a refusal by said..... to deliver the same, or any part thereof,

Now, on motion of....., of counsel for....., in favor of said motion, and after hearing....., of counsel for....., it is ordered and adjudged that said acts of the said "E. R. B." have impaired, impeded and prejudiced the rights and remedies of said.....in said proceedings.

It also appearing that the value of the said property was of the value of \$...., and that the costs and expenses of the said.....amount to the sum of \$...., at which sum they are hereby taxed. It is further ordered that an attachment as for contempt be issued against the said, returnable at a term of this court set down to be held at the court house in the....., on the....day of...., 189.., at...A. M.

It is further ordered that a copy of the warrant of attachment, of this order and of the affidavits upon which it is issued, be served upon the said.....when he is arrested.

57.

.....COURT.

IN THE MATTER OF THE APPLICATION FOR A WRIT OF HABEAS CORPUS IN THE PEOPLE EX REL. "A. B." v. "C. D."	Petition for a writ of <i>habeas corpus</i>. Code, § 2278.

To, judge of

The petition of respectfully shows that he is a judgment-creditor of; and that on the day of, 189., a judgment was duly rendered in court, in an action wherein "W. C. S." was plaintiff and was defendant, in favor of the plaintiff and against the defendant therein for \$...., that the judgment-roll in said action was duly filed and the judgment therein duly docketed on the aforesaid day in the office of the clerk of, reference to which is hereto had, and the same is made a part of this petition; that afterwards and on or about the day of, 189., an execution on said judgment was duly issued and delivered to the sheriff of, where the said judgment-debtor then resided and yet resides, and that said execution has been duly returned by said sheriff wholly unsatisfied, and the said judgment remains wholly unpaid; that on or about the day of, 189., Hon. upon proper affidavit duly issued an order under section 2435 of the Code of Civil Procedure for the examination of....., which said order, and the affidavit upon which it was issued, were duly served upon the said as prescribed by section 2452 of the aforesaid Code, which said order, affidavit and affidavit of service are hereto annexed

and made a part of this petition. That afterwards and on or about the day of, 189.., the said judge, from the examination and testimony in said proceedings, duly made an order directing to deliver to , sheriff of (or , receiver in said supplementary proceedings), certain property in said order mentioned, which said order is hereto annexed and forms a part of this petition; that said last-named order was duly served upon the said, and at the same time a written demand was made upon the said to deliver the said property as aforesaid, which said order, written demand and proof of service thereof, are hereto annexed and form a part of this petition. Your petitioner further shows that the said refused and neglected to comply with the last-mentioned order as appears by the affidavit of hereto annexed, and which forms a part of this petition. That afterwards the said was, and now is in the custody of the sheriff of on an execution against his person and an attachment cannot issue herein.

Wherefore, your petitioner prays that a writ of *habeas corpus* issue herein as prescribed by section 2278 of the Code of Civil Procedure, and that the said be dealt with as prescribed by section 2282 of said Code.

“W. C. S.”

..... County, ss. :

..... being duly sworn, says he has read the foregoing petition, and that the same is true to the knowledge of deponent except as to those matters therein stated to be alleged upon information and belief, and as to such matters, he believes them to be true.

“W. C. S.”

Sworn to before me this day of, 189..

.....

58.**HABEAS CORPUS. CODE, § 2278.**

(Title of cause.)

The People of the State of New York, to the Sheriff of the County of, Greeting:

It appearing by the petition of this day read and filed, that there is good reason to believe that is guilty of a contempt in refusing and neglecting to obey an order made by in proceedings supplementary to execution in the matter of the examination of, a judgment-debtor, and it also appearing by said petition that the said is in your custody, we therefore command you that you have the body of said before at on the day of, 189., at A. M., and on such other days and times as shall order and direct, in your custody, under safe and secure conduct, to answer for his contempt as prescribed by section 2282 of the Code of Civil Procedure.

....., Judge.
Dated, 189..

"J. A. J.," Attorney for Plaintiff,
....., N. Y.

59.**COMMITMENT FOR NEGLECT TO PAY MONEY OR COSTS. CODE, § 2282.**

(Title of cause.)

The People of the State of New York, to the Sheriff of Greeting:

WHEREAS, on the....day of..... 189., by an order made by.....in this action, it was ordered that the

said.....be committed and imprisoned, charged with the contempt mentioned in said order, which imprisonment should commence upon the.....'s discharge from custody under the mandate by virtue of which the sheriff of.....now holds the said....., and that the said.....be then kept in confinement until he shall have paid the fine therein imposed upon him for his misconduct, amounting to \$....

Now, therefore, we command you that upon the discharge of the said.....from custody, under the mandate, by virtue of which he is held by you, you take the body of the said....., and him safely and closely keep in your custody in the common jail of the county of, until he shall fully pay the fine imposed, as aforesaid, to-wit., the sum of \$...., or until he shall be discharged by the further order of the court.

....., Judge.

Dated....., 189..

"J. A. J.," Plaintiff's Attorney,

....., N. Y.

60.

ORDER FOR COMMITMENT UNTIL PAYMENT OF FINE. CODE, § 2282.

(Title of cause.)

On reading and filing the petition of....., the above-named plaintiff, to which are annexed the affidavit and order for the examination of....., the....., with proof of service thereof, the testimony taken under said order, the order for the delivery of certain property by to the sheriff of.....(or to the receiver therein), a written demand upon said.....to deliver as aforesaid, together with proof of service of the same upon the said...., the affidavit of....., verified on the....day of....189.., showing a refusal and

neglect of said.....to comply with said order and demand, the writ of *habeas corpus* herein, with the return of the sheriff therein, and the said.....having appeared personally, and interrogatories specifying the facts and circumstances alleged against him, having by order of the court been filed, and a copy thereof having been served on him, and the answer of.....to the petition, and his answers to the interrogatories, having been duly filed, and it having been referred to "G. H. G.," Esq., to examine the said.....and take such further proofs as either party might produce before him in relation to the alleged contempt, and the said referee having certified the said testimony to....., and having filed his report, and it appearing to....., from such report and the testimony taken by him, and the affidavits and petition, that the said.....is guilty of the contempt charged,

It is ordered and adjudged that the said.....is guilty of the contempt charged, and that said misconduct of the defendant was calculated to and did actually defeat, impair, impede or prejudice the rights and remedies of the plaintiff herein. It is further ordered and adjudged that the value of the property.....which the said.....; was of the value of \$.... It is further ordered and adjudged that the plaintiff's actual costs and expenses in regard to the said contempt proceedings, is taxed at the sum of \$.... It is further ordered that a fine of \$...., the amount of the above-named items, be and the same is hereby imposed upon the said.....for his misconduct, to be paid by him to the said plaintiff.

It is further ordered that the said.....be committed until the payment of the said sum of \$...., upon his discharge from custody under the mandate by virtue of which he is held by the sheriff, as prescribed by section 2282 of the Code of Civil Procedure.

That a commitment issue accordingly.

....., Judge.

Dated....., 189..

.....

Plaintiff's Attorney.

....., N. Y.

61.

ORDER FOR COMMITMENT FOR PUNISHMENT. Code, § 2283.

(Title of cause.)

An order to show cause having been heretofore issued by me as prescribed by subdivision 1 of section 2269 of the Code of Civil Procedure, why the defendant should not be punished for contempt for disobeying an order requiring him to deliver certain personal property to the sheriff of (or to, a receiver) made by me in proceedings supplementary to execution, upon a judgment entitled court, "W. C. S." v. "E. R. B.," on the day of, 189.., which said order and the affidavit upon which it was issued was duly served upon the said on the day of, 189.., and the said having duly appeared upon said order to show cause, and it having been duly referred by me to to take the testimony of the parties herein as to the contempt charged, and said referee having duly taken such testimony and reported the same to me.

Now, upon reading and filing the affidavit of, verified on the day of, 189..; the affidavit of, verified on the day of, 189..; the orders in supplementary proceedings, the testimony taken by the said referee, and all the orders and proceedings in this action, and after hearing, of counsel for the plaintiff, and, of counsel for defendant, it is ordered and adjudged, and I do hereby order and adjudge, that the said is guilty of the contempt charged against him, and that such misconduct was calculated to, and actually did, defeat, impair, impede or prejudice the rights and remedies of the said plaintiff. It is further ordered and adjudged that the value of the property which the defendant refused and neglected to deliver to sheriff (or receiver) was and is of the value of \$...., and that the plaintiff's costs and expenses have been taxed by me upon

proper proof at the sum of \$.... It is further order that be confined in the common jail of county for the period of six months, or until he shall have fully paid the sum of \$.... to the plaintiff herein, which fine is hereby imposed upon said for his said misconduct.

It is further ordered that upon a certified copy of this order the sheriff of may arrest the said and keep him as aforesaid without further process.

....., Judge.

Dated, 189..

62.

.....COURT.

IN RE EXAMINATION OF "E. R
B.," A JUDGMENT-DEBTOR, IN
PROCEEDINGS SUPPLEMENTARY
TO EXECUTION UPON A JUDG-
MENT ENTITLED

..... COURT.

W. C. S.

v.

E. R. B.

Affidavit for order appoint-
ing receiver. Code, § 2465.

..... County, ss :

..... being duly sworn, says he is that upon the annexed affidavit of, an order was duly made herein by for the examination of, which said order is hereto annexed.

That no action, under sections 2432-2461 of the Code of Civil Procedure, is pending against the judgment-debtor herein (or that another proceeding supplementary to execution is pending against the judgment-debtor, in which of is the judgment-creditor, and a receiver has not been appointed therein). That the judgment-debtor has property applicable to the payment of the judgment herein, viz.:.....

Sworn to before me this day of, 189..

.....

63.

NOTICE OF APPLICATION FOR APPOINTMENT OF RECEIVER.

(Title of matter.)

Take notice that upon the annexed affidavit and order for examination, and the affidavit of, and upon all the pleadings and proceedings in this matter, the undersigned will apply to the Hon., to whom the said order for examination is returnable, at his chambers in the city of on the ... day of Oct., 189..., at 10. A. M. of that day for a rule or order.

I. Appointing receiver herein, as prescribed by sections 2464-2470 of the Code of Civil Procedure.

II. For such other, further or different relief, as to the judge may seem meet, with costs.

Yours, etc.,

.....
Attorney for judgment-creditor.

Dated...., 189..

(Address debtor or his attorney.)

64.

.....COURT.

IN THE MATTER OF THE EXAMINATION OF "E. R. B.," A JUDGMENT-DEBTOR (OR "A. B.," A THIRD PERSON), IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION UPON A JUDGMENT ENTITLED

..... COURT.

W. C. S.

v.

E. R. B.

Order appointing receiver.
Code, § 2464.

WHEREAS, An order for the examination of under section 2435 (or section 2436 or 2441, or a warrant

under section 2437) of the Code of Civil Procedure, was heretofore duly made returnable to me, upon the proper affidavit, upon a judgment in a certain action, in the court, wherein was plaintiff and was defendant (whereby it was ordered that it be referred to to take the examination as prescribed by sections 2442-2444 of the Code, and whereas said referee has certified to me the testimony given in proceedings had before him). And whereas, it appears to me, by the affidavit of, verified on the day of, 189..., that notice of application for an order that a receiver be appointed herein, was on the day of, 189..., duly and personally served upon, and that no other proceeding supplementary to execution is now pending against the judgment-debtor herein, nor is any action pending against the judgment-debtor under sections 1871-1879 of the Code of Civil Procedure.

Now, on reading and filing the affidavit and order of examination herein, and proof of service of notice of application, and on motion of, of counsel for the judgment-creditor, and, of counsel for the judgment-debtor,

I hereby order that of the be, and he hereby is appointed receiver of all the debts, property, equitable interests, rights and things in action, of the said judgment-debtor, that such receiver, before he enter upon the execution of his trust, execute a bond as prescribed by section 715 of the Code of Civil Procedure, in the penalty of \$...., to be approved by me, and file the same in the office prescribed by section 2467 of the aforesaid Code.

I also order that the judgment-creditor recover dollars costs, and his disbursements in these proceedings, which disbursements are hereby taxed at the sum of \$...., and that said costs and disbursements be paid to him or his attorney out of the funds of the said judgment-debtor, that come to the hands of the receiver. And the said judgment-debtor is hereby restrained from transferring or disposing of his property, or in any manner interfering therewith, until further order in the premises.

It is further ordered that the said judgment-debtor, upon being served with a certified copy of this order,

and of notice of filing of the bond prescribed by this order, deliver to the said receiver all property and money now in his possession, or under his control, belonging to him and not exempt by section 2463 of the Code of Civil Procedure.

....., Judge.

Dated, 189..

65.

..... COURT.

(Title of cause.)

Know all men by these presents : That we of, ... of, and of are held and firmly bound unto the people of the state of New York, in the sum of dollars, for which payment well and truly to be made, we jointly and severally bind ourselves, our and each of our heirs and representatives, firmly by these presents.

Sealed with our seals.

Dated the....day of...., 189..

WHEREAS, by an order dated the....day of...., 189.., made by Hon.....in proceedings supplementary to execution under section 2464 of the Code of Civil Procedure, upon a judgment in the.....court, wherein..... was plaintiff, and.....defendant, the above bounden was appointed receiver of the property and effects of the said....., the judgment-debtor. Now the condition of this obligation is such that if the above bounden.....shall faithfully discharge his duties as such receiver, and render account to the court whenever directed to do so, then this obligation to be void, otherwise to remain in full force.

Sealed and delivered in the presence of.....

(L. S.)

(L. S.)

(L. S.)

.....County, ss.:

On this....day of...., 189.., personally appeared before me.....and.....and....., the persons named in and who executed the above bond, and severally acknowledged that they executed the same for the purposes therein mentioned.

(Officer's signature.)

(Add justification of sureties.)

I approve the within bond as to form, and as to the sufficiency of the sureties.

Dated, 189.., Judge.

66

INVENTORY OF RECEIVER.

.....COURT.

(Title of matter.)

An inventory of the real and personal estate of....., a judgment-debtor, taken by.....under an order made herein under section 2464 of the Code of Civil Procedure, the....day of...., 189..

I. Books debts.

I find upon the books of.....an account against of \$....for.....

One against.....of....., etc., etc.

II. Mortgages, stock, bond, notes, etc.

I find among the papers that have come to my hand as receiver, the following:

A note made by.....

A.....

III. Leases and real estate.

A lease of a hotel and premises in, from to....., for the term of....years.

IV. Stock.

One show case.

Ten large lamps, etc., etc.

(Signature of receiver.)

.....County, ss.:

.....being duly sworn says he is the receiver above named, that the above is a true inventory of the property and effects of....., committed to his care as such receiver, so far as the same has come to his knowledge.

(Signature of receiver.)

Sworn to before me this....day of...., 189..

67.

NOTICE BY RECEIVER AND DEMAND OF PROPERTY.

.....COURT.

(Title of matter.)

Take notice of an order filed in the.....clerk's office the....day of, 189.., of which the within is a copy. That I have given and filed a bond as required by said order, and that I claim from you any and all debts, property, equitable interests and rights in action which belonged to, the judgment-debtor, or in which he had any interest on the day of the service of the order of examination herein, viz.: on the....day of, 189.. (by virtue of said office I hereby demand and require you to deliver to me [or to A. B., my agent] the following goods and chattels..... which belonged to....., the judgment-debtor, on the day of...., 189.., and now belong to me. That I am ready to pay any legal claim that you may have on said chattels, and I will attend at the premises where the said goods now are at any time you may appoint and A. B., my said agent, will attend on the....day of...., 189.., at.... A. M., to receive and remove said chattels.

....., Receiver.

Dated....., 189..

To.....

68.**AFFIDAVIT OF RECEIVER AS TO REFUSAL OF PARTY TO DELIVER CHATTELS.**

..... COURT.

(Title of matter.)

..... County, ss.:

....., being duly sworn, says that on the day of, 189.., by an order of the Hon. in proceedings supplementary to execution, under section 2464 of the Code of Civil Procedure, he was duly appointed receiver of the property and effects of, a judgment-debtor, in an action wherein was plaintiff, and was defendant. That the said order has been duly filed and recorded as prescribed by sections 2467 and 2470 of the aforesaid Code, and deponent has given and filed a bond as prescribed by section 715 of said Code, and the aforesaid order that on the day of, 189.., at, he personally served said order of receivership together with a written notice that deponent had qualified as such receiver on by delivering to and leaving with each of them personally copies thereof, copies of which are hereto annexed and form a part of this affidavit. That at, on the day of, 189.., deponent served the annexed written demand on by delivering to and leaving with each a copy thereof (or that the annexed demand was personally served on as appears by the affidavit of hereto annexed). That the said has refused and neglected, and still refuses and neglects, to deliver said property, or any part thereof, to this deponent.

(Signature of receiver.)

Sworn to before me this day of, 189..

.....

On the annexed affidavit, and all the pleadings and proceedings in this matter, let show cause before

a special term of this court set down to be held at the court house in the city of, on the day of, 189.., at A. M., why he should not be required to deliver to, receiver herein, the property mentioned in the aforesaid affidavit.

....., Judge.
 Dated, 189..
 To

69.

RECEIVER'S PETITION FOR LEAVE TO SUE.

..... COURT.

(Title of matter.)

To the court of

The petition of, receiver of the property of, a judgment-debtor, respectfully shows :

I. That by an order made by Hon., a copy of which is hereto annexed, your petitioner was duly appointed receiver of the property and effects of, the above-named judgment-debtor ; that said order was duly filed as required by section 2467 of the Code of Civil Procedure, and your petitioner has given and filed a bond as required by said order and section 715 of said Code.

II. (Set forth the cause of action as in a complaint).

III. That the written request of the judgment-creditor, in whose behalf your petitioner was appointed, is hereto annexed and forms a part of this petition.

IV. That a bond as prescribed by rule 79 of the supreme court is hereto annexed and forms a part of this petition.

V. That your petitioner has, as receiver aforesaid, the following property : in his actual possession and that such property is sufficient to secure the person against whom the action is to be brought for any costs which he may recover against your petitioner.

VI. That your petitioner has made due and diligent inquiry as to the pecuniary standing and solvency of the said

.....and from such inquiry, your petitioner believes the said to be solvent, that said can be collected from his said property.

Your petitioner, therefore, prays that he may be allowed to commence and prosecute an action in against the said for said claim in such form of action or proceedings as counsel may advise.

(Signature of receiver.)

..... County, ss.:

..... being duly sworn, says he is the receiver in the above proceedings, that he has read the foregoing petition, that the same is true to the knowledge of deponent.

(Signature of receiver.)

Sworn to before me this day of, 189..

.....

70.

At a term of the court held at the court house in on the day of, 189..

PRESENT—Hon.

Justice.

..... COURT.

IN THE MATTER OF THE EXAMINATION OF "E. R. B.," A JUDGMENT-DEBTOR IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION, ETC.

} Order allowing receiver to sue.

On reading and filing the petition of receiver herein of the property of, a judgment-debtor, for leave to bring an action for, and it appearing that said has complied with the requirements of rule 79 on the supreme court, now, on motion of of counsel for said receiver.

Ordered, That said, as receiver, is hereby authorized and directed to commence and prosecute an action in

the court, in such form as counsel may advise,
against to recover on the aforesaid claim.

71.

RECEIVER'S PETITION FOR LEAVE TO SELL DOUBTFUL CLAIMS, ETC. RULE 78, S. C.

..... COURT.

(Title of matter.)

To court of

The petition of, receiver of the property of
....., a judgment-debtor, respectfully shows:

I. That by an order made by Hon. in proceedings supplementary to execution, under section 2464 of the Code of Civil Procedure, of which a copy is hereto annexed, your petitioner was duly appointed receiver of the property of, the above-named judgment-debtor; that said order was filed as required by section 2467 of said Code, and that thereafter your petitioner made and filed the bond as required by section 715 of said Code, as fixed by said order. That among other property, which came to your petitioner's hands, as such receiver, are

That your petitioner has repeatedly made diligent efforts to get his pay on said debts, and your petitioner has made due inquiry in relation to the said and the value of said lease, and from such inquiry believes that the said debts are desperate, and said claims to personal property are doubtful. Your petitioner therefore prays that he may be allowed, as such receiver, to sell such desperate debts and doubtful claims at public auction as prescribed by rule 78 of the supreme court.

(Signature of receiver.)

(Verification. Code Civ. Pro., § 526.)

72.ORDER FOR LEAVE TO SELL DOUBTFUL DEBTS AND CLAIMS.
RULE 78, S. C.

At a term of the court, held at
the court house in the on the....
day of...., 189..

PRESENT—Hon.....,
Justice.

(Title of matter.)

On reading and filing the petition of....., receiver herein of the property of "E. R. B.," a judgment-debtor, asking for leave to sell certain alleged doubtful claims and desperate debts, viz.:....., under rule 78 of the supreme court.

Now, on motion of....., of counsel for the said petitioner,

Ordered, That the said....., as receiver herein, be allowed to sell at public auction, at such place in..... as he shall think proper, all and every of the following debts and property (describe the property). That the said receiver shall give at least ten days' notice of such sale by serving a personal notice thereof on....., and by posting a notice thereof at three public places in the.....

73.RECEIVER'S NOTICE OF SALE OF DOUBTFUL CLAIMS AND
DEBTS. RULE 78, S. C.

(Title of matter.)

Notice is hereby given that by virtue of an order in the above-entitled proceedings, the subscriber as receiver in said

proceedings, will sell the following property,.....

 at public auction at.....on the....day of, 189.., at
 A. M. of said day.

(Signature of receiver.)

Dated, 189..

74.

PETITION OF A JUDGMENT-CREDITOR FOR ORDER THAT RE CEIVER PAY MONEY ON JUDGMENT, ETC.

..... COURT.

(Title of matter.)

The petition of.....respectfully shows:

That proceedings supplementary to execution were heretofore instituted upon a judgment wherein your petitioner was plaintiff (or A. B. was plaintiff) and "E. R. B.," the judgment-debtor herein, was defendant, at the instance of your petitioner, by an order which is hereto annexed, which said order was duly served on the judgment-debtor as required by section 2452 of the Code of Civil Procedure, as appears by the affidavit of service thereto annexed, that on the....day of, 189.., an order, of which a copy is hereto annexed, was made by Hon.....(annexed order appointing a receiver), which said order was duly filed as required by section 2467 of said Code; that said....., receiver, made and filed a bond as required by said order of receivership and section 715 of the said Code.

That he has funds for the payment of the judgment herein and costs. Your petitioner is entitled to priority in payment out of the funds in the hands of the said receiver in preference to any other creditor of the said judgment-debtor by reason of the prior service of his order for examination. That the following are the names of the judgment-creditors of the said judgment-debtor, and the time when their respective proceedings were commenced:

.....

Wherefore, your petitioner prays for a rule or order that the said receiver apply to the payment of your petitioner's judgment herein sufficient of the moneys in his hands to pay the same, with interest, and the costs mentioned in the order of receivership; that it be determined who is entitled to priority of payment out of said funds, and for such other, further or different order as to the court may seem meet.

(Signature of petitioner.)

(Verification. Code Civ. Proc. § 526.)

75.

ORDER TO SHOW CAUSE FOR APPLICATION OF FUNDS.

.....COURT.

(Title of matter.)

Upon the annexed petition of, and all the pleadings and proceedings in this matter, let show cause before a term of set down to be held at the court house in the city of, on the.... day of, 189.., at A. M., why the petitioner should not have a rule or order.

I. That receiver apply sufficient of the funds in his hands, as such receiver, to pay the judgment of and the costs and disbursements allowed in the order of receivership.

II. For such other, further or different relief as to the court may seem meet.

Let this order and the annexed petition be personally served on, on or before 6 P. M. of the day of 189.., and such service shall be deemed sufficient.

(Signature of judge.)

Dated, 189..

76.

At a special term of the court, held at
the court house in the city of, on
the day of 189..

PRESENT—Hon.

Justice.

IN RE EXAMINATION OF "E. R. B.,"
A JUDGMENT-DEBTOR, IN PRO-
CEEDINGS SUPPLEMENTARY TO
EXECUTION.

Order that receiver pay judg-
ment-creditor.

On reading and filing the petition of verified
on the day of, 189.., with affidavit and order for
examination annexed, the order to show cause and proof of
the service of said petition and order on and
after hearing, of counsel for the petitioner, in
favor of the motion, and, of counsel for
.....in opposition thereto.

Ordered, that, the said receiver, pay to
..... the costs allowed in the order of receivership
to the judgment-creditor, and after deducting the receiver's
charges and commission hereby taxed at \$...., the said
receiver pay the said..... \$...., on his judgment
and take proper receipts therefor.

77.

RECEIVER'S PETITION FOR LEAVE TO SELL REAL ESTATE.

..... COURT.

(Title of matter.)

To the court of

The petition of respectfully shows :

That heretofore, and on the day of, 189.., Hon.
..... made an order under section 2464 of the Code

of Civil Procedure appointing your petitioner receiver of the property and effects of, a judgment-debtor, a copy of which said order is hereto annexed, and forms a part of this petition; that said order was duly filed and recorded as prescribed by sections 2467 and 2470 of said Code, and your petitioner made and filed the bond required by said order of receivership as prescribed by section 715 of the aforesaid Code. That said order of receivership was duly filed in the office of the clerk of the county where the said resides, and the real estate hereinafter described is situated. That at the time of filing said order as aforesaid, the said had an interest in the following described real property in said county of, viz: (describe the real property, the interest of the judgment-debtor therein, the incumbrances thereon, if any, and the value thereof over and above incumbrances).

That your petitioner has sold the chattels of the judgment-debtor, and collected all the choses in action, which came to his hands as such receiver, and that your petitioner has not sufficient funds in his hands to pay the judgment of the judgment-creditor herein, and that said land is the only available property out of which any money can be made to pay the same. Wherefore, your petitioner prays for an order for leave to sell at public auction all the interest of the judgment-debtor in said land.

(Signature of petitioner.)

..... .. County, ss. :

..... being duly sworn, says he is the receiver above named, that he has read the foregoing petition signed by him, that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to such matters, he believes them to be true.

(Signature of petitioner.)

Sworn to before me this day of, 189..

.....

78.

At a term of the court held
at the court house in the city of on
the day of, 189..

PRESENT—Hon.

Justice.

IN THE MATTER OF THE EXAMINA-
TION OF "E. R. B.," A JUDG-
MENT-DEBTOR, IN PROCEEDINGS
SUPPLEMENTARY TO EXECUTION.

Order allowing receiver to sell
real estate.

On reading and filing the petition of, re-
ceiver of the property and effects of, a judg-
ment-debtor, verified on the day of, 189.., asking
for leave to sell the real estate described therein, the order
to show cause why such leave should not be granted, and
proof of due service of such petition and order upon
..... and after hearing, of counsel for
....., in favor of such motion, and, of
counsel for, opposed.

Ordered, That as such receiver, is hereby
authorized and directed to sell (describe the land) at public
auction at all the interest of, the
judgment-debtor, for cash ; that weeks' notice of the
time and place of such sale, with a description of the land
as set forth in this order, be published in one of the public
papers in at least once in each week prior to
said sale.

79.

At a special term, etc.

IN RE EXAMINATION OF "E. R. B.,"
A JUDGMENT-DEBTOR, IN PRO-
CEEDINGS SUPPLEMENTARY TO
EXECUTION UPON A JUDGMENT
ENTITLED

.....COURT.
W. C. S.
v.

E. R. B.

AND UPON A JUDGMENT ENTITLED

.....COURT.
W. W. K. .
v.
E. R. B.

Order of reference to take re-
ceiver's account and report
priority of creditors.

It appearing that was duly appointed a receiver under section 2464 of the Code of Civil Procedure, by an order made by Hon. on the day of ..., 189., in behalf of on a judgment entitled, ... court, "W. C. S." v. "E. R. B.," and that thereafter and on the day of, 189., upon the application of, an order was duly made extending such receivership to a judgment entitled court, "D. B." v. "E. R. B.," and that thereafter and on the day of ..., 189., upon the application of, an order was duly made extending such receivership to a judgment entitled court, "W. W. K." v. E. R. B."

Ordered, that it be referred to "W. C. R.," of, to ascertain the amounts of the aforesaid judgments, and the priorities of the respective judgment-creditors under said receivership, and report the said facts to this court with all convenient speed. That said referee also take and state the accounts of, the said receiver, and report the same to this court, and state therein what, if any, property remains undisposed of.

80.

At a term of the court held at
the court house in the city of on the
.... day of, 189..

PRESENT—Hon.,
Justice.

IN RE "A. B.," A RECEIVER OF THE
PROPERTY AND EFFECTS OF "E.
R. B.," A JUDGMENT-DEBTOR IN
PROCEEDINGS SUPPLEMENTARY
TO EXECUTION.

} Order for discharge of receiver.

On reading and filing the account of "A. B.," a receiver, the report of, the referee appointed to pass the said accounts, the certificate of, clerk of this court, that the said receiver had paid into court the sum of \$, the balance found to be in his hands; the order to show cause why the said receiver should not be discharged, with proof of service thereof upon, and on motion of, of counsel for the receiver.

Ordered, that the said "A. B." be and he hereby is, discharged from the duties of said receivership; that the bond given by said "A. B." be and the same is hereby vacated.

81.

REFeree's REPORT ON RECEIVER'S ACCOUNT.

..... COURT.

(Title of matter.)

To court of

It having been referred to me to take and settle the account of, receiver appointed under section 2464

of the Coke of Civil Procedure, and to ascertain and report as to the priority of liens of the judgment-creditors under said receivership, I do hereby report that I have been attended by the said receiver and..... the counsel, for....., and for.....; and the account of the receiver having been brought before me, together with his vouchers and transcripts of the several judgments under which the said receivership was made and to which it was extended, and having heard the parties, and taken the evidence offered, I find and report.

I. That the said receiver hath received by and out of the estate of "E. R. B.," the judgment-debtor, the sums of money set out in the annexed account, amounting in the aggregate to the sum of \$...

II. That the said receiver has paid the following sums:
.....

III. That said receiver is to be allowed for his commissions and for fees the several sums set out in his account.

IV. That after deducting said sums paid out and the commission, fees and expenses of the receiver, there is a balance in the hands of said receiver of \$....

V. That an order in the proceedings by "W. C. S.," one of the above-named judgment-creditors, was first served, and said judgment-creditor is entitled to a priority of payment out of the aforesaid fund.

That all the vouchers, transcripts and statements of the property still in the hands of the receiver, are hereto annexed and returned.

....., Referee.

Dated, 189..

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